

POLITICAL PARTIES AND PRESIDENTIAL OVERSIGHT

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ABSTRACT

The intimate, and often underappreciated, relationship between political parties, the presidency, and the administrative state has profound consequences for the functioning of these three institutions at the heart of American political life. Failure to draw out and illuminate this connection has led to an incomplete understanding of administrative law—both descriptively in what the law does and can do, and normatively in what it should do. In particular, courts and commentators have not grappled with the fundamental shift experienced by political parties over the past several decades—from traditional party organizations that were locally focused and ideologically diverse to today’s high-tech, polarized, and nationally oriented parties. This transformation was strongly influenced by the growth of administrative agencies and the modern presidency, and has important implications for the practical realities of presidential control over agencies, for the normative justifications supporting the President’s prominent role in the administrative state, and for the struggle over control of agencies between the President and Congress. This Article maps out the intersection of President, administration, and contemporary parties and proposes “responsible party administration” as a normative framework to evaluate how well institutional arrangements and judicial doctrines forward administrative values such as expertise, coherence, and legality while accommodating a system of regulated rivalry in which two programmatically distinct parties compete for the reins of the administrative state.

INTRODUCTION

In the past several decades, the intimate relationship between political parties, the presidency, and the administrative state has undergone a basic transformation. Traditional political parties—dominant for nearly a century and caricatured in depictions of smoke-filled backroom deals between party bosses—effectively disappeared.¹ Into that void stepped a “new breed” of contemporary political parties that are primarily concerned with policy programs, rather than patronage, and that are nationally oriented, rather

1. See *infra* Part I.C (discussing heyday and decline of traditional party organizations). See RICHARD M. HARNETT & BILLY G. FERGUSON, UNIPRESS: UNITED PRESS INTERNATIONAL COVERING THE 20TH CENTURY 48 (attributing first usage of “smoke-filled room” to describe political decision making to journalist Raymond Clapper’s coverage of the 1920 national Republican convention, in which successive failed balloting rounds led to a lengthy discussion between party leaders that resulted in a compromise nominee, Warren G. Harding).

than locally focused.² The decline and revival of American political parties has pervasively influenced the relationship between the President and the administrative state.³ Although political scientists who study the presidency, government bureaucracy, and political parties have examined these changes,⁴ administrative law scholarship has not adequately grappled with the normative and descriptive consequences of this profound shift.

Drawing on a substantial body of recent political science literature, this Article examines the changed relationship between presidents, parties, and administration in light of several central questions in administrative law. The new breed of political parties has important and underappreciated consequences for how presidents exert control over agencies, whether the President's prominent role in the administrative state is justified, and how Congress and the President interact in their shared oversight roles. Perhaps most important, contemporary parties contribute to broader trends that have consigned traditional normative models of administrative law to a "lost world" that is unlikely to return.⁵ New normative models are needed, better capable of responding to current circumstances. In a spirit of exploration of this new terrain, the Article proposes *responsible party administration* as an alternative normative aspiration for administrative law. This framework seeks to reconcile the benefits of partisan rivalry with administrative values such as expertise, coherence, vigor, and legality. Striking this balance is no simple task and existing institutional arrangements and legal doctrines succeed to varying degrees under this rubric.

The transformation to contemporary parties gathered steam in the decades leading up to the 1960s, when social, cultural, legal, and technological changes undermined the mass political parties that had structured political life in the United States for nearly a century and a half.⁶ The waning of traditional party organizations did not spell an end to political parties. Instead, after a period in which parties "hovered in the

2. JEANE KIRKPATRICK, *THE NEW PRESIDENTIAL ELITE: MEN AND WOMEN IN NATIONAL POLITICS* 3 (1976) (referring to "the 'new breed' hypothesis" that "American politics is being transformed in some important, fairly fundamental ways by the ascendancy [in party politics] of large numbers of new men and women whose motives, goals, ideals, ideas, and patterns of organizational behavior are different from those of the people who have dominated American politics in the past"); see *infra* Part I.C.

3. For a general discussion of the relationship between presidents and agencies, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

4. See *infra* Part I.C. See Kenneth S. Lowande & Sidney M. Milkis, "We Can't Wait": *Barack Obama, Partisan Polarization and the Administrative Presidency*, 12 THE FORUM 3 (2014) (examining "the tension between presidential leadership, the administrative state, and modern political parties" in the context of high profile executive actions of the Obama administration).

5. Daniel Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEXAS L. REV. 1137 (2014).

6. JOHN H. ALDRICH, *WHY PARTIES?: A SECOND LOOK* (2011).

background,” they reemerged in the late 1970s and 1980s with renewed institutional forms suited to the contemporary needs of office seekers, interest groups, and policy-oriented activists.⁷

This transformation is sufficiently striking that it is possible to speak of two distinct types of American political parties that were dominant during different historical periods.⁸ *Traditional party organizations*, which had a long heyday that lasted from the mid-nineteenth century through roughly 1960, were locally oriented, ideologically diverse, and motivated primarily by patronage rather than policy.⁹ The *contemporary political parties* that have supplanted this earlier form are nationally oriented networks of affiliated interests that are highly professionalized and characterized by a set of shared policy goals, rather than simply a desire for patronage jobs.¹⁰

This Article argues that the revival of American political parties has had a ubiquitous and underappreciated influence on presidential oversight of the administrative agencies.¹¹ Without accounting for this influence, it is impossible to understand many important features of the contemporary administrative state. For example, as a purely descriptive matter, scholars have failed to adequately explore how contemporary parties affect the ability of the President to translate theoretical power into reality. Presidents are thought to have two primary strategies for exerting control over the

7. *Id.* at 316 (citing Kenneth A. Shepsle, *The Changing Textbook Congress*, in *CAN THE GOVERNMENT GOVERN?* 238 (John E. Chubb & Paul E. Peterson eds., 1989)).

8. The terminology introduced in this paragraph creates a rough distinction to categorize a change in party structure in the second half of the twentieth century. *See infra* Part I.C. Of course, different or finer-grained distinctions are possible.

9. There was considerable variation during a time period that began with the telegraph and railroads and ended with the integrated circuit and air travel, but there was enough consistency in the structure and purposes of political parties that Professor Aldrich has stated that “the basic structure of the modern mass political party was reasonably well established by the 1860s [and] this form remained intact until about 1960.” ALDRICH, *supra* note 6, at 163–64.

10. *See* MARTY COHEN, DAVID KAROL, HANS NOEL & JOHN ZALLER, *THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM 16* (2008) (arguing that the “mixed coalition of party loyalists” that came to prominence over this period is “a real political party . . . rather than a haphazard collection of special interests and unsavory characters”). This coalition includes “officeholders, ideologues, fund-raisers, interest groups, and others.” *Id.*; *see also* ALDRICH, *supra* note 6, at 285 (describing campaign personnel—“pollsters, media advisers, direct mail specialists, campaign finance and law experts, and all the rest”—as essential components of contemporary parties). Joseph Fishkin and Heather Gerken use the term “shadow parties” to refer to this similar phenomenon. *See* Joseph Fishkin & Heather K. Gerken, *The Party’s Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175.

11. A few words on terminology may be helpful. The phrases “political party” and “partisan” have multiple meanings that can be a source of confusion. Throughout this Article, the phrases “traditional party organization” and “contemporary political party” will refer to the two distinct forms of party organization discussed in the previous paragraph. “Political parties” will refer to both traditional party organizations and contemporary parties. “Partisan” will be used throughout in its adjectival sense to describe motives or actions that arise from political parties and their programs.

executive: centralization and politicization.¹² Centralization involves the accumulation of authority directly in the White House and its offices. Politicization involves the use of the appointments power to place individuals who can be counted on to promote the President's agenda in senior management positions at agencies.

These strategies, and their consequences for administrative law and regulatory outcomes, have been extensively discussed in the legal literature.¹³ But there has been less attention paid to how presidents respond to the challenge of identifying the cadre of loyal and competent personnel who are needed to carry out these two strategies. "People are policy,"¹⁴ and with the right information and few external constraints over personnel, presidents can use centralization and politicization strategies to build an "institutional presidency" that exerts powerful control over the administrative state.¹⁵ This Article contributes to the literature on presidential control by illuminating how the transition to contemporary political parties helps explain the ability of presidents to identify the loyal, competent personnel necessary to achieve policy goals through personnel decisions.

In addition to helping to explain how presidential control is executed, contemporary parties deeply affect the normative justifications for the President's influence over agencies. Defenders of presidential oversight consistently argue that the President has a special relationship with the electorate, and the Supreme Court frequently references the President's representative capacity in cases that enhance the presidency's supervisory power over agencies.¹⁶ Critics of enhanced presidential power over the administrative state, meanwhile, question whether the President can be

12. See Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235, 235 (John E. Chubb & Paul E. Peterson eds., 1985). Both of these strategies are related to the President's supervisory role within the executive. There is a constitutional law debate concerning whether presidents also enjoy "directive" power over agencies, although the practical significance of this question may not be substantial. See generally Nina A. Mendelson, *Another Word on the President's Statutory Authority over Agency Action*, 79 *FORDHAM L. REV.* 2455 (2011) (discussing the debate over "directive" authority).

13. See, e.g., Kagan, *supra* note 3, at 2376–85.

14. James P. Pfiffner, *Presidential Transitions*, in *THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY* 85, 94 (George C. Edwards III & William G. Howell eds., 2009) (internal quotation marks omitted). This expression has been attributed to President Ronald Reagan's transition. See *id.*; see also Paul Laxalt & John Lofton, *60-Second Debate*, *N.Y. TIMES*, Mar. 18, 1982, at B14.

15. See JOHN P. BURKE, *THE INSTITUTIONAL PRESIDENCY: ORGANIZING AND MANAGING THE WHITE HOUSE FROM FDR TO CLINTON* (2d ed. 2000). The term "institutional presidency" typically refers only to the White House, see *id.* at 6, although it is not clear that the political appointees in the White House and at agencies have a fundamentally different relationship with the President.

16. See *infra* Part I.B.

counted on to genuinely promote majority preferences through agency oversight.¹⁷

Political scientists who study contemporary political parties and presidential elections are divided between a “politician-centered” camp that views parties as subservient to the needs of politicians, and a “group-centered” camp that believes that parties are mechanisms for organized interest to “capture and use government for their particular goals.”¹⁸ A politician-centered theory predicts that presidents will seek to maximize electoral prospects by attuning oversight to the preferences of median voters.¹⁹ A group-centered theory, however, predicts that presidential influence will skew agency decision making toward special interests.²⁰

The presidential representation hypothesis is inconsistent with the reality of contemporary political parties, which at least to some extent are driven by activists to depart from the preferences of median voters. This Article argues, however, that an alternative normative justification for presidential control is possible that is more consistent with the reality of contemporary parties. Grounded in the concept of “responsible party government” from the political science literature,²¹ this justification is based on the ability of presidential control to help facilitate a party system in which the major parties develop competing policy visions, test those visions for voter appeal during elections, and implement them once in office.²² Although neither party platform tracks the median voter, party competition promotes vitality in the electoral process and innovation in policymaking.²³

Finally, although several scholars have noted that struggles between the President and Congress over the reins of administrative agencies have become increasingly heated in recent years,²⁴ the potential for contemporary parties to enhance democratic accountability has led to a misdiagnosis of the current state of inter-branch relations. The rise of contemporary parties raised a new set of questions about the role of parties in structuring legislative politics and the interaction between Congress and the President over agency oversight. An important new feature of this dynamic has been the incorporation of regulatory policy into national

17. See, e.g., Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 63–66 (2013).

18. Kathleen Bawn, Martin Cohen, David Karol, Seth Maskett, Hans Noel & John Zaller, *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSP. ON POL. 571, 571 (2012).

19. See *infra* Part II.

20. See *infra* Part II.

21. See *infra* Part III.C.

22. See *infra* Part III.C.

23. See *infra* Part III.

24. See *infra* Part IV.A.

politics. Commentators observing this change have argued that congressional oversight is either abandoned during periods of united government or used to engage in “blood-sport confrontations over agency rulemaking” during periods of divided government.²⁵ Both have costs. A lack of congressional oversight reduces democratic accountability, while “blood-sport” proxy battles impose resource costs on agencies and increase the contentiousness and length of the confirmation process.²⁶

But it is a mistake to allow these costs to obscure the democratic potential created by the incorporation of regulatory policy into national party politics. Congressional oversight of agencies creates opportunities for the party not in the White House to criticize the administration and develop and publicize alternative positions, which can be evaluated by voters during elections. This process shares similarities with confrontations between the cabinet and “shadow government” in parliamentary systems that can facilitate democratic responsiveness.²⁷ Although enhanced tensions between the branches brought on by contemporary parties create costs for the administrative state—in terms of delay and potential for gridlock—the importance of those costs cannot be accurately assessed without acknowledging the potential benefits of party competition over regulatory policy.

Just as the rise of contemporary political parties may clash with the constitutional system of separated power, the role of parties in structuring oversight of agencies may also conflict with core values at the heart of the administrative state, including neutral competence, representativeness, coherence, and vigor. Extending the concept of responsible party government to the agency context, the Article proposes *responsible party administration* as a normative framework to evaluate how well law and legal institutions balance the benefits of party government with the requirements of sound administrative decision making. The pervasive influence of contemporary parties on the administrative state gives rise to a host of arrangements—from judicial doctrines to agency structure—that can be evaluated according to the responsible party administration paradigm. This Article explores two: judicial doctrines concerning

25. Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1711–12 (2012) (quoting Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 758 (2011)); see also Kagan, *supra* note 3, at 2346–49 (arguing that opposite-party members of Congress face incentives to focus oversight activities on regulatory matters that have been signaled to be high priorities for the President).

26. See McGarity, *supra* note 25, at 1711–16. See also Anne Joseph O’Connell, *Shortening Agency and Judicial Vacancies through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L. J. 1645 (2015).

27. See *infra* Part IV.C.

deference to agency decisions, and executive regulatory review carried out by the Office of Information and Regulatory Affairs (OIRA) in the White House.

This Article will proceed in five Parts. Part I provides a brief overview of three interrelated trends that serve as a backdrop for presidential oversight of agencies. The first is the reorganization of the Executive Branch to bring agencies under more centralized control; important landmarks include the Executive Reorganization Act (adopted under President Franklin Roosevelt) that created the Executive Office of the President and President Reagan's Executive Order 12,291 establishing the practice of centralized regulatory review. The second trend is the development of a president-centric administrative law that has, to some degree, insulated presidential influence over agencies from congressional and judicial interference. The third is the decline of traditional party organizations and the rise of contemporary parties.

Part II examines how contemporary political parties affect the mechanisms of presidential oversight. First, it explains the claim that the President can exercise effective oversight of the administrative state through centralization and politicization. It then argues that contemporary parties can help draw agency policy toward presidential preferences by providing presidents with access to a pool of loyal and competent professionals and giving the President relative freedom in settling intraparty disputes over policy through personnel choices.

Part III reviews the role that majoritarian justifications have played in legitimizing the extension of political oversight by the President, both by courts and by commentators, and then evaluates that justification in light of the structure and influence of contemporary political parties. It will introduce the competing politician-centered and group-centered models of presidential parties and describe the consequences of those models for presidential oversight of agencies. It will also discuss the potential for such oversight, even if not reflective of median-voter preferences, to promote democratic accountability through responsible party government.

Part IV examines the role of contemporary parties in structuring the relationship between congressional and presidential agency oversight. The resurgence of strong legislative parties, organized around national policy programs, appears to have created conditions ripe for particularly contentious relationships between the executive and the legislature during periods of divided government.²⁸ Many commentators have responded to

28. Professor Cass Sunstein uses the word "partyism," which he describes as a bias akin to racism, to describe the current climate. See Cass R. Sunstein, *Partyism*, U. CHI. LEGAL F. (forthcoming 2015).

this development with worries about gridlock, incivility, and obstruction.²⁹ Although these concerns may have substantial merit, there are countervailing benefits associated with the public development and exposition of party programs on regulatory policy that ought to be weighed against these costs.

Part V proposes and develops the concept of responsible party administration as a normative framework for balancing the benefits of vigorous party competition with administrative law values such as rationality, consistency, expertise, and impartiality. Administrative values may favor agencies that are relatively insulated from political oversight, but removing agencies from political influence cuts policymaking off from parties and the benefits they provide. To be successful, modern administrative law must strike a middle course between agencies that are too responsive to demands from extreme constituencies within political parties and agencies that are too far removed from everyday democratic politics.

I. PRESIDENTS, PARTIES, AND ADMINISTRATION

There are many actors who vie for control of the federal bureaucracy, including presidents, Congress, courts, trade associations, issue advocacy organizations, and bureaucrats.³⁰ Although “no single entity has emerged finally triumphant” in this contest,³¹ many observers have concluded that, of all of the combatants, the President now sits in a uniquely powerful position to influence agency decisions.³²

The role of the President in the administrative state as it stands today is the consequence of three mutually reinforcing trends over the course of the past century: the internal restructuring of the Executive Branch to empower centralized managerial control; the reform of administrative law to remove or weaken judicial and congressional constraints on agencies and presidential oversight; and the reorganization of American politics around national, presidentially oriented, programmatic parties. The importance of the first two trends for presidential oversight is well recognized. To provide

29. See *infra* Part IV.C. For an example, see MICKEY EDWARDS, *THE PARTIES VERSUS THE PEOPLE: HOW TO TURN REPUBLICANS AND DEMOCRATS INTO AMERICANS* (2012).

30. Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094, 1095 (1985).

31. Kagan, *supra* note 3, at 2246.

32. See, e.g., Moe, *supra* note 12, at 266–67.

context for this Article's exploration of the importance of the third trend, this Part offers a brief overview.³³

A. *Executive Restructuring*

Since at least the New Deal, presidents have “engaged in a series of strenuous efforts to assert control over administrative decision making.”³⁴ These efforts respond to the growth of “performance-based expectations” for the President and the expansion of administrative agencies into nearly every corner of economic life.³⁵ At the level of constitutional theory, there is a question of whether presidents do, or ought to, have the power to direct the actions of executive officials.³⁶ At a more practical level, scholars have characterized two control strategies that presidents have deployed: centralization and politicization.³⁷

Centralization involves the accumulation of authority directly in the White House and its offices.³⁸ Over the past several decades, presidents have expanded the authority of White House offices over the budget, national security, communications, regulatory policy, personnel, and legislative affairs.³⁹ They have effectuated this shift through executive order, formal reorganization, and informal shifts in bureaucratic turf or lines of responsibility.⁴⁰

33. PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS AND SOCIAL ANALYSIS 2* (2004) (“Placing politics in time can greatly enrich both the explanations we offer for social outcomes of interest, and the very outcomes that we identify as worth explaining.”).

34. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 *GEO. L.J.* 1337, 1344 (2013).

35. Dennis M. Simon, *Public Expectations of the President*, in *THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY* 135, 145–46 (George C. Edwards III & William G. Howell eds., 2009) (discussing the historical origins of contemporary expectations). Mashaw notes that the expansion of the regulatory state was gradual. *See* JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012). But there is little doubt that it picked up speed with the New Deal agencies, such as the National Labor Relations Board and the Securities and Exchange Commission, and then again with the risk-regulation agencies, such as the Environmental Protection Agency and the Occupational Safety and Health Administration. *See generally* RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 34–42 (1983) (discussing the growth of counter-bureaucracy in the White House during the Nixon administration).

36. There is a large literature on this question. *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 24–25 (2008); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 *DUKE L.J.* 963, 999 (2001).

37. Moe, *supra* note 12.

38. *Id.* at 244.

39. *See generally* MATTHEW J. DICKINSON, *BITTER HARVEST: FDR, PRESIDENTIAL POWER AND THE GROWTH OF THE PRESIDENTIAL BRANCH* (1996) (discussing management style in the Roosevelt administration and contrasting it with subsequent presidents, focusing in particular on the role of the White House bureaucracy).

40. *See generally* NATHAN, *supra* note 35.

Centralization has been accompanied by an explosion in the size and sophistication of the presidential bureaucracy. The Executive Office of the President (EOP) was created during the FDR administration through the Reorganization Act of 1939.⁴¹ The EOP originally included the Bureau of the Budget (the predecessor to the Office of Management and Budget) as well as the White House Office.⁴² Over the years, the White House Office has been transformed from a “few informal, generalist aides to FDR” to a “highly specialized” bureaucracy with “more than 400 staffers.”⁴³ The EOP also houses the Council of Economic Advisers, the Council on Environmental Quality, the National Security Council, the Office of Science and Technology Policy, the Office of the U.S. Trade Representative, and the Domestic Policy Council.⁴⁴ Nelson Polsby has characterized this bureaucracy as a “presidential branch”—distinct from the Executive Branch—that “imperfectly attempts to coordinate both the executive and legislative branches on its own behalf.”⁴⁵

The presidential bureaucracy exercises both informal and formal influence over agency decision making. Informally, White House officials manage access to the President, develop policy initiatives, control communications with the media and the legislature, and facilitate interagency coordination.⁴⁶ The archetypical example of formal influence over agency action is executive review of regulatory decision making. President Ronald Reagan’s Executive Order 12,291⁴⁷ established

41. Reorganization Act of 1939, ch. 36, 53 Stat. 561–565 (1939). The Act was spurred by the recommendations of the Brownlow Committee, which suggested increased presidential control over the administrative state.

42. See Reorganization Plan No. 1 of 1939, 3 C.F.R. 248 (1939), *reprinted in* 5 U.S.C. app. at 582 (2012), *and in* 53 Stat. 1423 (1939).

43. JAMES P. PFIFFNER, *THE MODERN PRESIDENCY* 3 (6th ed. 2011). The White House Office now includes the National Economic Council, the Office of Communications, the Office of Legislative Affairs, the Office of Presidential Personnel, the Office of Public Engagement and Intergovernmental Affairs, and the White House Counsel.

44. *Executive Office of the President*, THE WHITE HOUSE, <https://www.whitehouse.gov/administration/eop> (last visited Sept. 25, 2015).

45. Nelson W. Polsby, *Some Landmarks in Modern Presidential-Congressional Relations*, in *BOTH ENDS OF THE AVENUE: THE PRESIDENCY, THE EXECUTIVE BRANCH, AND CONGRESS IN THE 1980S* 1, at 20 (Anthony King ed., 1983).

46. Kagan, *supra* note 3, at 2299.

47. Exec. Order No. 12,291, 3 C.F.R. 127 (1982) *reprinted in* 5 U.S.C. § 601 at 473–76 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 at 638–42 (2000). There were important predecessors to the Reagan Executive Order. President Nixon initiated a “Quality of Life review,” which required the Environmental Protection Agency and the Occupational Safety and Health Administration to engage in an interagency consultation process and provide an estimate of the costs of proposed regulation along with a set of alternatives. THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* 18 (1991). President Gerald Ford created the Council on Wage and Price Stability (CWPS) in the White House, which exercised increased central control over agency rulemaking. Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 *FORDHAM URB. L.J.* 1257,

centralized review over rulemaking in the newly created Office of Information and Regulatory Affairs (OIRA), an entity in the Office of Management and Budget. Under Reagan's order, all major regulations were required to be cleared by officials at OIRA before they could be adopted. Centralized review along the model established by Reagan has continued through subsequent administrations, with each President offering revisions but leaving the essential structure in place.⁴⁸ Debates about the normative desirability of regulatory review have continued as well.⁴⁹

The other strategy presidents use to assert control over agencies, commonly referred to as politicization, involves "an attempt to infiltrate the agencies through aggressive use of the appointment power."⁵⁰ To effectuate a politicization strategy, presidents can increase the total number of officials who are political appointees rather than civil servants and exert greater control over appointments to ensure that they are filled by individuals with a high degree of loyalty.⁵¹ The two major expansions of political appointees occurred during the presidencies of Dwight D. Eisenhower and Jimmy Carter.⁵² President Eisenhower created the category of Schedule C—"positions of a confidential or policy determining character"—in 1954 to be filled by political appointees outside the civil

1264 (2006). President Jimmy Carter went even further with Executive Order 12,044, which required the newly created Regulatory Analysis Review Group within the CWPS to perform an economic analysis for any major regulation. Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

48. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 at 802 (2012); Exec. Order No. 13,563, § 1(a), 3 C.F.R. 215 (2011), *reprinted in* 5 U.S.C. § 601 at 816 (2012); Michael A. Livermore, *A Brief Comment on "Humanizing Cost-Benefit Analysis"*, 2 EUR. J. RISK REG. 13 (2011); Michael A. Livermore & Richard L. Revesz, *Retaking Rationality Two Years Later*, 48 HOUS. L. REV. 1, 12–19 (2011); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 5–6 (1995).

49. See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49–50, 75 (2006); Joseph Cooper & William F. West, *Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules*, 50 J. POL. 864, 882–83 (1988); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1082 (1986); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 4 (1994); Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 613 (2011); RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, WHITE PAPER 909, A RETURN TO COMMON SENSE: PROTECTING HEALTH, SAFETY, AND THE ENVIRONMENT THROUGH 'PRAGMATIC REGULATORY IMPACT ANALYSIS' 2 (2009).

50. Kagan, *supra* note 3, at 2277 n.123.

51. See Andrew Rudalevige & David E. Lewis, *Parsing the Politicized Presidency: Centralization and Politicization as Presidential Strategies for Bureaucratic Control* 4 (Sept. 1, 2005) (unpublished manuscript) (on file with the Alabama Law Review) (suggesting that politicization also includes "involving civil servants in political fights, and making appointment and promotion decisions in the civil service on the basis of political attitudes").

52. These expansions came after Progressive Era reforms that, ultimately, put an end to the spoils system and severely contracted party influence over appointments. See, e.g., Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883) (codified as amended at 5 U.S.C. § 3304 (2012)).

service merit system.⁵³ During his term, as many as 1,128 positions were filled through the Schedule C mechanism.⁵⁴ During the Carter administration, the Civil Service Reform Act of 1978 created the Senior Executive Service (SES),⁵⁵ a “corps of executives selected for their leadership qualifications,”⁵⁶ and provided that ten percent of total SES positions could be filled with political appointees.⁵⁷

Based on the expanded appointment freedom provided by Schedule C and non-career SES positions, the number of positions filled outside of civil service requirements (either at the discretion of the President or a presidential designee, or upon nomination and approval by the Senate) nearly doubled from 1960 to 1980, both in absolute terms and as a percentage of non-military federal employees.⁵⁸ Now, incoming presidents are presented with between 3,000 and 4,000 political appointments that must be filled across the Executive Branch.⁵⁹

In addition, control over these personnel decisions has been centralized over the past several decades. As Part II examines in more detail, there has been an increase in the role of the White House in selecting and vetting candidates for political positions, reducing the latitude given to cabinet secretaries to select their staffs. Experiments with a more decentralized personnel selection process—most notably during the Carter administration—proved to generate unacceptable political costs. In the face of those experiences, presidents have continually ratcheted up the centralization of personnel decisions.

It is worth noting that agency structure, as well as norms and traditions, can play a role in affecting the potential effectiveness of centralization and politicization strategies. Politicization may be more difficult at the “independent agencies” (such as the Securities and Exchange Commission) in which for-cause removal and bipartisan appointment requirements limit the ability of the President to place desired candidates in office. These structural features are important and the subject of considerable legislative

53. PAUL CHARLES LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 45 (1995) (internal quotation marks omitted).

54. *Id.*

55. Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 3131, 92 Stat. 1111, 1154–55.

56. U.S. OFFICE OF PERS. MGMT., GUIDE TO SENIOR EXECUTIVE SERVICE QUALIFICATIONS intro. (2010), https://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/guide-tosquals_2010.pdf.

57. Civil Service Reform Act of 1978 § 3134.

58. David E. Lewis, *The Contemporary Presidency: The Personnel Process in the Modern Presidency*, 42 PRESIDENTIAL STUD. Q. 577, 580 (2012).

59. *Id.* at 578.

bargaining,⁶⁰ but they should not be overestimated. The President's ability to appoint the chair of independent commissions provides important leverage,⁶¹ and once a majority of co-partisans is appointed, boards tend to track presidential preferences.⁶² Conventions of independence also limit the President's ability to impose control over certain agencies, such as the Federal Reserve Bank and the Food and Drug Administration.⁶³ Further, under the relevant executive orders, independent agencies have been excused from the requirements of centralized executive review.⁶⁴ So although presidents may have broad incentives to pursue centralization and politicization strategies across the executive, their effectiveness varies across agencies depending on a variety of legal, institutional, and bureaucratic factors.⁶⁵

B. *Presidential Control in Administrative Law*

Executive restructuring to facilitate centralization and politicization has largely taken place on the authority of the President, with occasional support from Congress in the form of legislation. But doctrinal changes in administrative law have also played a role in augmenting presidential power over agencies. In the late 1970s and early 1980s, roughly contemporaneously with the Reagan expansion of White House control over agencies, several doctrinal developments scaled back judicial oversight of agencies and facilitated more direct lines of centralized accountability within the Executive Branch. These doctrinal developments complemented efforts within the Executive Branch to reinforce presidential control. The presidential-control orientation on the Court, however, was never full-throated and it has faded in recent years,⁶⁶ a point that will be

60. See generally DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY 1946–1997* (2003).

61. See, e.g., RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* (2d ed. 1996). See generally Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *CORNELL L. REV.* 769 (2013).

62. Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 *B.U.L. REV.* 459 (2008).

63. See Adrian Vermeule, *Conventions of Agency Independence*, 113 *COLUM. L. REV.* 1163, 1208 (2013).

64. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *TEX. L. REV.* 15, 30–37 (2010). This exemption could be changed by a future president. See Datla & Revesz, *supra* note 62.

65. If there is a zero-sum game between the President and Congress, then the independent agencies might be less subject to presidential control, but more subject to congressional influence. Justice Scalia argues that this is the case, at least for the Federal Communications Commission, in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009).

66. Recently for example, in *King v. Burwell*, the majority opinion, authored by Chief Justice Roberts and assented to by the liberal wing of the Court, stated that, on “question[s] of deep economic

returned to in Part V. Given the extensive treatment of these issues elsewhere, this introductory section provides only a brief survey that covers a few of the relevant highlights.⁶⁷

Under the “traditional model of administrative law,” agencies are correctly understood as the “agents” of Congress, created and empowered by statutes, which “provide[] rules that control and limit the agency’s exercise of its authority”; when agencies fail to comply with these rules, aggrieved parties can make recourse to independent courts, which ensure conformity between agency action and statutory purposes.⁶⁸ The exercise of discretion is legitimated on the democratic foundation of statutory authorization and the presumed separation of administrative decision making from politics.⁶⁹

As faith in impartial expertise waned and outsider groups pressed for greater inclusion in administrative processes, a “reformation” period began that was marked by expanded standing rules, more probing judicial review, and increasing procedural requirements for agency rulemaking.⁷⁰ The goal of this reformation was to create, through administrative law, pluralistic agency processes that would proxy for the broader democratic accountability that was thought to be missing from bureaucratic decision making.⁷¹

The reformation was short lived, lasting from the late 1960s to the mid-1970s. A number of important cases in the late 1970s and early 1980s diminished the scope of judicial review and explicitly favored presidential

and political significance,” the presumption of *Chevron* deference to agency decisions may not hold. 135 S. Ct. 2480, 2489 (2015).

67. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 485–91 (2003) (providing an intellectual history of the support within the legal academy for a President-centered approach to administrative law); Sidney A. Shapiro, *Administrative Law after the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689 (2000) (arguing that steps by the executive and courts to reform administrative law in the 1980s had a distinctly anti-regulatory cast).

68. Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 569 (1992). Under one version of this account agencies are viewed as “mere transmission belt[s]” that translated legislative goals into administrative action through the application of expertise. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675–78 (1975).

69. See generally *id.* at 1678. There is extensive literature on the politics/administration divide, which continues to have contemporary supporters.

70. *Id.* This loss of faith had multiple sources, including fear of agency capture by special interest groups and concern that agencies were failing to actively carry out their mandates to promote broad public interests. See Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL’Y 203 (2006) (review of capture literature); Livermore & Revesz, *supra* note 34; Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997); Stewart, *supra* note 68, at 1681–83 (1975).

71. Stewart, *supra* note 68, at 1670.

power.⁷² In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,⁷³ decided in 1978, the Supreme Court held that courts may not “impose upon [an] agency its own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good,” but must instead stick to the requirements found in the text of the Administrative Procedure Act.⁷⁴

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁷⁵ in 1984, the Supreme Court announced a standard of deferential review for agency interpretations of ambiguous statutes. In *Chevron*, the Court specifically acknowledged the accountability of agencies to the President in justifying this deferential standard of review.⁷⁶ Decisions such as *Buckley v. Valeo* in 1976 (which strictly limit any role for Congress in the appointment of Executive Branch officials⁷⁷) facilitated more direct lines of accountability within the executive. *I.N.S. v. Chadha* in 1982, which struck down the legislative veto, removed an important tool for Congress to exert control over agencies.⁷⁸ The Court’s standing decision in *Lujan v. Defenders of Wildlife* invoked separation-of-powers concerns to limit judicial interference in executive decision making.⁷⁹ Several D.C. Circuit Court cases in the same time period further protected the White House’s ability to play a substantial role in influencing agency policy, mainly by rejecting challenges to agency action on the basis that the influence of the President or White House offices biased agency decision making.⁸⁰

The Court’s transfer of power to the executive has, however, always been tempered. Most important, the Court’s *State Farm* jurisprudence allows probing analysis under the Administrative Procedure Act’s “arbitrary and capricious” standard, and agencies face a quasi-procedure

72. Peter L. Strauss, *Presidential Rulemaking*, 72 CHL.-KENT. L. REV. 965 (1997). Richard Pierce, *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391 (1987).

73. 435 U.S. 519 (1978).

74. *Id.* at 549. *But see* Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978) (critiquing the decision). The courts still examine the record for substantive adequacy under the APA’s “arbitrary or capricious” review.

75. 467 U.S. 837 (1984).

76. *Id.* at 865–66. Interestingly, the Court’s “democratic legitimacy” argument went beyond the expertise-driven justifications that were forwarded in the Government’s briefs in that case. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1087 (2008).

77. *Buckley v. Valeo*, 424 U.S. 1 (1976).

78. 462 U.S. 919 (1982).

79. 504 U.S. 555 (1992).

80. *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981); *State of New York v. Reilly*, 969 F.2d 1147, 1152 (D.C. Cir. 1992). For a criticism of these decisions, see Lisa Heinzerling, *Classical Administrative Law in the Era of Presidential Administration: Response to Daniel Farber and Anne Joseph O’Connell*, *The Lost World of Administrative Law*, 92 TEXAS L. REV. SEE ALSO 171 (2014).

requirement to generate voluminous records in support of their decisions.⁸¹ Even within the *Chevron* regime, there have been many high-profile instances of courts overruling agency decisions that were clearly linked to presidential priorities.⁸² Despite strong language in *Vermont Yankee* admonishing the D.C. Circuit for its procedural innovations, the Court has largely eschewed playing an oversight role on the matter, and has given the lower courts relatively free rein to maintain their prior habits.⁸³ Decisions like *U.S. v. Mead Corp.* and, more recently, *King v. Burwell*, have reduced the circumstances in which *Chevron* deference is applicable.⁸⁴ Justice Thomas has gone substantially further, arguing that *Chevron* deference essentially amounts to unconstitutional delegation of judicial and legislative power to agencies.⁸⁵ Even Justice Scalia, once *Chevron*'s most vociferous supporter,⁸⁶ has taken to lamenting that "too many important decisions . . . are made nowadays by unelected agency officials . . . rather than by the people's representatives in Congress."⁸⁷ On structural matters, even though the Court has remained fairly pro-President (for example, recently expanding limitations on Congress's power to place restrictions on removal), discomfort with presidential power was evidence in the Court's split decision in a case over recess appointments.⁸⁸

Overall, there is an official story of administrative law in which courts facilitate presidential strategies of politicization and centralization and then defer to agency decisions on the grounds that the (democratically accountable) President exercises control over agencies. The Court, at times, has seen that official story through. But there are also strong crosscurrents

81. *Motor Vehicles Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983).

82. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497 (2007) (overturning interpretation of the Clean Air Act to exclude greenhouse gases from regulation, a position favored by the George W. Bush administration); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (overturning Clinton-era rule subjecting tobacco to FDA oversight).

83. *See generally* Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418 (1981); Richard J. Pierce, Jr., *Waiting for Vermont Yankee II*, 57 ADMIN. L. REV. 669 (2005); Jack Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856 (2007).

84. *United States v. Mead Corp.*, 533 U.S. 218 (2001) (limited *Chevron* deference to situations in which it "appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [] the agency interpretation claiming deference was promulgated in the exercise of that authority"); *see supra* note 66 (discussing *King v. Burwell*).

85. *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

86. *See Mead Corp.*, 533 U.S. at 239 (strongly objecting to limitation of *Chevron* deference) (Scalia, J., dissenting).

87. *EPA v. Homer City Generation*, 134 S. Ct. 1584 (2014) (Scalia, J., dissenting).

88. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (removal); *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550 (2014) (recess appointments).

of skepticism about presidential control and willingness to intercede when a sufficient number of Justices decide that it is justified.⁸⁹

C. *Decline and Rebirth of American Political Parties*

In the late 1970s, at roughly the same time the Court began issuing its pro-presidential oversight decisions, a new breed of political parties emerged that transformed the structure of American political life. This section provides a brief overview of that transformation.

Since shortly after the founding, party rivalry in one form or another has been a dominant feature of American politics.⁹⁰ Political parties can be defined generally as “groups organized for the purpose of achieving and exercising political power.”⁹¹ These groups are frequently thought of as embracing three basic elements: the party in the electorate (voters who are loyal to and identify with the party); the party as organization (party officials, professional staff, donors, and volunteers); and the party in government (officeholders and candidates).⁹² There is a long literature within political science that focuses on the role that political parties play in democratic systems.⁹³ Elements of political parties that have received considerable attention include the role of parties in structuring legislative politics,⁹⁴ the makeup and influence of local party organizations,⁹⁵ the role

89. See, e.g., Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (arguing that *Massachusetts v. EPA* can be read as the Court taking on a greater “expertise protection” function).

90. See generally COHEN ET AL., *supra* note 10.

91. ENCYCLOPÆDIA BRITANNICA, MICROPÆDIA VOLUME VIII 84 (15th ed. 1975). Nancy Rosenblum provides a normative definition:

[A] party is a group organized to contest for public office; it is avowed in its partisanship and operates not conspiratorially but in public view; it is not an ad hoc coalition or arrangement for vote trading and compromise on a specific issue, but an institution formed for ongoing political activity; and it can claim a substantial number of followers

NANCY L. ROSENBLUM, *ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* 20 (2008).

92. V.O. KEY JR., *POLITICS, PARTIES, AND PRESSURE GROUPS* (5th ed. 1964).

93. See, e.g., JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942) (explaining that parties facilitate competition by politicians for popular support); MARTIN SHEFTER, *POLITICAL PARTIES AND THE STATE: THE AMERICAN HISTORICAL EXPERIENCE* (1994).

94. See GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN* (2d ed. 2007); GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA* (2005). Work on “conditional party government” covers parties in the legislature. See John H. Aldrich & David W. Rohde, *The Republican Revolution and the House Appropriations Committee*, 62 J. POL. 1 (2000).

95. See GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 22–25 (8th ed. 2013); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (2d ed. 2004) [hereinafter *ELECTORAL CONNECTION*] (explaining that candidates had to appeal to local constituents, regardless of policy affiliation); DAVID R. MAYHEW, *PLACING PARTIES IN AMERICAN POLITICS* (1986) [hereinafter *PLACING PARTIES*] (studying local party organizations and finding a long-term decline).

of parties in presidential elections,⁹⁶ and the importance of political parties for structuring voters' policy preferences.⁹⁷

This literature teaches that the organization, function, and folkways of political parties evolve in the face of cultural, technological, and legal change. Political scientists sometimes refer to “party systems” that channel political conflict through established party institutions over the course of reasonably well-defined time periods. When a party system is no longer adequate to the challenges of the day, it is swept away in a realignment that fundamentally alters party composition as regional, ideological, and interest group blocs shift allegiances.⁹⁸ The election of William McKinley in 1896 and FDR in 1932 are typically seen as such realignments.⁹⁹

Traditional party organizations operated as the foundation for what Joel H. Silbey characterizes as a “unique, partisan era” that lasted from the late 1830s into the 1890s.¹⁰⁰ This form of party organization got its start when new technologies and political alliances led to the creation of the “mass mobilization” political party by Martin Van Buren and the other organizers of the Democratic Party in the 1830s.¹⁰¹ The mass parties were the first to engage everyday voters in party activities, and sought to actively cultivate party identification among non-elites. They were organized primarily along local lines, were not highly ideologically driven, and were strongly motivated by the desire to generate patronage benefits for party loyalists—most famously through the “spoils” system of delivering government jobs in exchange for party services.¹⁰²

96. See COHEN ET AL., *supra* note 10.

97. See DONALD GREEN, BRADLEY PALMQUIST & ERIC SCHICKLER, *PARTISAN HEARTS AND MINDS* 204–29 (2002).

98. See generally Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29 (1999). There is some resonance between party-system transitions, realignment elections, and Ackerman's periods of constitutional politics. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014). At the very least, Ackerman's constitutional moments match up with several of the party system transitional periods. David R. Mayhew argues that the party system framework, organized around realignment elections, is not a particularly informative way to analyze political development. See DAVID R. MAYHEW, *ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE* 4–5 (2002). This Article takes no particular position on this debate; the transition from traditional party organizations to contemporary parties may not best be thought of as having occurred through realignment elections. What is important is that the transition occurred sometime after the New Deal was in full swing and before President Reagan's election in 1980.

99. Ending the third and fourth party systems, respectively. See generally *supra* note 98.

100. JOEL H. SILBEY, *THE AMERICAN POLITICAL NATION, 1838–1893*, at 238 (1991) (describing heyday of mass political parties and their effects on political life).

101. See generally JOEL H. SILBEY, *MARTIN VAN BUREN AND THE EMERGENCE OF AMERICAN POPULAR POLITICS* (2002).

102. See SILBEY, *supra* note 100.

A variety of factors conspired to drive traditional party organizations from the heart of American political life. During the Progressive Era, there were sustained efforts to undermine prior forms of political association that were thought to be corrupt and undemocratic.¹⁰³ Progressive reforms, such as the secret ballot and expansion of civil service requirements, reduced the power of party bosses.¹⁰⁴ Expansion of the regulatory state “took over by policy and through entitlement the kinds of services local machines had once made available.”¹⁰⁵ After a long period of “mixed forms” that lasted into the mid-twentieth century, whereby parties competed with alternative political organizations including interest groups and administrative agencies,¹⁰⁶ traditional parties were “greatly weakened.”¹⁰⁷

During the latter half of the twentieth century, legal, organizational, and technological changes finally led to the death of traditional party organizations and the birth of contemporary parties. John H. Aldrich gives perhaps the definitive account.¹⁰⁸ Intraparty differences, especially over the issue of civil rights, which had been submerged by the economic crisis of the Great Depression and the exigencies of World War II, began to resurface and cause considerable tension within the parties. The final blow came when traditional party organizations lost the last bastion of their power, the “effective monopoly [they held] on the resources—the capital, the labor, and the flow of information—that were necessary to run an effective campaign.”¹⁰⁹ According to Aldrich, the 1960 presidential election ejected traditional party organizations from that stronghold when John F. Kennedy created a personal campaign organization in his presidential bid, rather than relying on the party organization. New technologies, including the spread of television to many American households and the availability of relatively cheap air travel, greatly reduced the costs of directly communicating with voters and local elites. A “new breed” of party activists, motivated not by patronage opportunities but instead by demands for policy change, could be recruited to donate time

103. Richard Jensen, *Party Coalitions and the Search for Modern Value: 1820–1970*, in *EMERGING COALITIONS IN AMERICAN POLITICS* (Seymour Martin Lipset ed., 1978).

104. See ALDRICH, *supra* note 6, at 281.

105. *Id.* Sidney Milkis has examined in detail how the rise of the administrative state has transformed partisanship. See SIDNEY M. MILKIS, *THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL* 4 (1993) (arguing that political parties have acted, since the time of the founding, to thwart presidential administration and that the New Deal administrative revolution was designed, in part, to “transcend[]” party politics).

106. SILBEY, *supra* note 100, at 241.

107. ALDRICH, *supra* note 6, at 167.

108. See *id.*

109. *Id.* at 282.

and money to an individual candidate, rather than a party.¹¹⁰ Kennedy was able to construct his own organization based on his personal charisma, family connections, and policy vision, rather than having to rely on a traditional party organization for electoral services.¹¹¹

The decline continued after the 1960 election. After its turbulent 1968 convention, the Democratic Party drew up a set of internal reforms that vastly increased the role of primaries in the selection of the presidential nominee.¹¹² Those reforms were followed by a similar set for the Republicans. Campaign finance reform and alternative fundraising channels reduced the financial role of traditional party organization.¹¹³ A class of professional campaign operators, skilled in the new technologies of mass communication, provided the services once dominated by parties.¹¹⁴ The electoral infrastructure of the parties was allowed to decay.¹¹⁵ In the legislature, the rise of candidate-centered elections cut the cord between members of Congress and their party, freeing members to establish a more direct “electoral connection” with their constituents and reducing pressure to toe the party line.¹¹⁶ There was a decline in partisan voting in Congress and an increase in the activity of alternative voting blocs, such as the “conservative coalition” of southern Democrats and conservative Republicans that blocked (or attempted to block) liberal initiatives. In the electorate, there was a rise of “independent” voters, and the value of party as a “signal” to voters about the policy positions of affiliated politicians was reduced.¹¹⁷ Observers of these collective trends argued that they together sounded the death knell of American political parties.¹¹⁸

110. See KIRKPATRICK, *supra* note 2.

111. See ALDRICH, *supra* note 6, at 283.

112. HERBERT B. ASHER, PRESIDENTIAL ELECTIONS AND AMERICAN POLITICS 7 (rev. ed. 1980).

113. John H. Aldrich, *Presidential Campaigns in Party- and Candidate-Centered Eras*, in UNDER THE WATCHFUL EYE 59, 69–71 (Mathew D. McCubbins ed., 1992).

114. See PLACING PARTIES, *supra* note 95, at 7. Even traditional outreach techniques (such as door-to-door canvassing) that were traditional party organization specialties have become technology- and data-driven. See SASHA ISSENBERG, THE VICTORY LAB: THE SECRET SCIENCE OF WINNING CAMPAIGNS (2012).

115. For example, after taking office, President Lyndon B. Johnson imposed severe cuts on the Democratic National Committee. Sidney M. Milkis, *The Presidency and Political Parties*, in THE PRESIDENCY AND THE POLITICAL SYSTEM 341, 348 (Michael Nelson ed., 8th ed. 2006).

116. See ELECTORAL CONNECTION, *supra* note 95.

117. ALDRICH, *supra* note 6, at 262–63.

118. See DAVID S. BRODER, THE PARTY’S OVER: THE FAILURE OF POLITICS IN AMERICA 251–54 (1971); WALTER DEAN BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS (1970); Jack Dennis, *Trends in Public Support for the American Party System*, 5 BRIT. J. FOR POL. SCI. 187 (1975); Gerald M. Pomper, *The Decline of the Party in American Elections*, 92 POL. SCI. Q. 21 (1977); see also Lawrence C. Dodd & Bruce I. Oppenheimer, *The House Transition*, in CONGRESS RECONSIDERED 31, 50 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2d ed. 1981) (describing parties in Congress as “‘phantoms’ of scholarly imagination”).

Today, “[n]o one worries any more about the irrelevance of parties.”¹¹⁹ The decline of traditional party organizations was not the end of American parties, but was instead the beginning of a transformation that led to the rise, like “a phoenix . . . from the ashes,” of contemporary parties.¹²⁰ This new party form grew gradually over the course of the 1970s and 1980s, and their nature remains contested in the political science literature (a point that will be returned to in Part III.B). But there is general agreement about some of the basic characteristics that describe the parties that currently dominate the political scene. These characteristics affect how contemporary parties manifest in the electorate, in government, and as organizations.¹²¹ They include the following:

Contemporary parties are programmatic. This feature of parties could be referred to as homogeneity, polarization, or coherence. This Article adopts the word “programmatic” to describe the phenomenon. In the electorate, voters now associate political parties with policy programs: Democrats promote “liberal” policies such as universal health care, affirmative action, and more stringent pollution control; Republicans promote “conservative” policies such as tax cuts, right-to-work laws, and deregulation. Voters who affiliate with a party are now more likely to share the programmatic positions that they associate with their party.¹²² In the Legislature, the two parties have relatively clear policy programs, and members largely adhere to those programs in their voting.¹²³ Organizationally, programmatic parties are closely associated with policy-oriented activists and groups that provide labor, money, and channels of communication with affiliated voters.

Contemporary parties are nationally oriented. Traditional party organizations were collections of relatively autonomous state and local parties, with national party institutions that mediated and

119. ALDRICH, *supra* note 6, at 320.

120. Milkis, *supra* note 115, at 353.

121. KEY, *supra* note 92 (on tripartite structure of parties).

122. There are contested views about how the link between party programs and voter identification came about. *See, e.g.*, MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS (2009).

123. *See* ALDRICH, *supra* note 6, at 202–54; Richard Fleisher & John R. Bond, *The Shrinking Middle in the U.S. Congress*, 34 BRIT. J. POL. SCI. 429 (2004); THE PEW RESEARCH CENTER, PARTISAN POLARIZATION SURGES IN BUSH, OBAMA YEARS (2012), <http://www.people-press.org/files/legacy-pdf/06-04-12%20Values%20Release.pdf>.

coordinated but did not lead.¹²⁴ Organizationally, that structure has been reversed, and state and local party organizations now rely heavily on the national committees, which have become increasingly sophisticated, for financial, technological, and logistical support. In the electorate, there is far less regional variation among party-affiliated voters.¹²⁵ In government, there has been a shift in the relative importance of constituent services versus the promotion of national policy. Even state and local officials now use their offices to engage in debates over national policy issues,¹²⁶ presumably at the expense of more traditional local concerns.

Contemporary parties are professionalized. Electoral campaigns, and especially presidential campaigns, are now high-tech affairs that rely on a dizzying array of experts in public relations, marketing, social media, fundraising, logistics, polling, data mining, and many other fields.¹²⁷ To be effective electorally and organizationally, parties now rely heavily on a cadre of campaign professionals who are affiliated with an official party organization or an associated group, or who operate as free agents within the sphere of one or the other of the parties. In government, officials rely on political appointees with expertise in law, social science, information technology, national security, and communications (inter alia) to navigate the complex policy environment of the modern state.¹²⁸

There is much more that can be (and has been) said about contemporary political parties.¹²⁹ Other important features of the partisan landscape include: communications technologies, legislative rules, super donors contributing to super PACs, constitutional protection for independent expenditures, campaign finance reform, regional sorting according to partisan affiliation, personality- and gaffe-driven campaigns, voter

124. KEY, *supra* note 92.

125. An important piece of this is the change in behavior of southern Democrats. Cf. ALDRICH, *supra* note 6, at 241.

126. See generally Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

127. ISSENBERG, *supra* note 114.

128. This point is discussed more thoroughly in Part II. It is not generally observed in the political science literature, but follows similar logic.

129. See Joseph Fishkin & Heather K. Gerken, *The Two Trends That Matter for Party Politics*, 89 N.Y.U. L. REV. ONLINE 32 (2014), <http://www.nyulawreview.org/sites/default/files/pdf/nyulawreviewonline-89-32-fishkin-gerken.pdf> (discussing the rise of “shadow parties” and the decline of “formal parties”).

inattention, cable TV and social media Balkanization, the rise of Tea Party–contested primaries.

But it is not necessary to have a complete survey of this landscape before we proceed. The most important takeaway from this section is in the broad strokes. Political parties now are different from those that structured American politics for a century and a half and that still exerted considerable influence when the modern administrative state was constructed during the Progressive Era and New Deal and for several decades thereafter.¹³⁰ The patronage-oriented, locally autonomous, low-tech traditional party organizations of the past have disappeared. After a period of lull, in their place appeared contemporary parties that are programmatic, nationally oriented, and professionalized. As will be argued below, this transformation has had important consequences for the role of the President in the administrative state.

II. THE MECHANICS OF PRESIDENTIAL OVERSIGHT

This Part focuses on the descriptive question of how contemporary parties help presidents effectuate control over the administrative state. Although the centralization and politicization strategies discussed in Part I.A have the potential to increase presidential control over administrative agencies, they are by no means easy strategies to execute.¹³¹ Contemporary parties have the potential to lower the costs of these strategies, which may help account for the functional success of presidential administration over the past several decades.

A. *People Are Policy*

The principal–agent model has frequently been applied to relations between the President and civil servants at executive agencies.¹³² It can also apply internally within the White House, and between the President and

130. A variety of scholars in history and political science have examined the dynamic relationship between political parties and government institutions more generally during the early periods of the administrative state. *See, e.g.*, DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928* (2001); SCOTT C. JAMES, *PRESIDENTS, PARTIES AND THE STATE* (2000); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS* (1992); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920* (1982).

131. Centralization “has been both a boon and a bane to presidents.” PFIFFNER, *supra* note 43, at 3.

132. *See, e.g.*, Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609, 668 (2014).

political appointees at agencies.¹³³ The President has residual power over the central staff, including the power of hiring and (typically) firing. At agencies, some political appointees serve at the pleasure of the President, while others enjoy tenure-protected positions, most notably the commissioners at independent agencies. Regardless of the formal power to remove unsatisfactory appointees, as a practical matter, it is impossible for the President to be aware of most of the work that goes on in the Executive Office of the President, much less at agencies, and effectively monitoring and supervising that work is out of the question. The President is under incredible cognitive demands, with a calendar packed full of public appearances, fundraisers, and political glad-handing, leaving scarce time for reading briefing papers or conducting supervisory meetings.¹³⁴ Simply satisfying the decisional demands of the highest priority domestic and foreign matters requires nearly superhuman levels of mental endurance. For the President, monitoring is extremely costly, creating the preconditions for principal-agent problems.

So-called *presidential* control over agencies, then, is functionally exercised by presidential designees with little presidential supervision.¹³⁵ On many questions, the President will not have any opinion about the correct course of action, and in any case will not be consulted. The decisions of the political appointee or appointees charged with making them will be final, in effect if not formally. For the small number of decisions that require the President to act personally, it will largely be on the advice of, and on the basis of information provided by, that same group of appointees. If a policy or political question cannot be sorted out at a lower level of the executive and demands presidential attention, there is a good reason. It is likely controversial, complex, politically fraught, or

133. See generally George A. Krause, *The Secular Decline in Presidential Domestic Policy Making: An Organizational Perspective*, 34 PRESIDENTIAL STUD. Q. 779 (2004) (attributing the decline in presidents' domestic policymaking to an increase in size—and therefore unwieldiness—of the presidential bureaucracy).

134. Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357 (2010).

135. Kagan recognized that her argument concerning presidential control sometimes elided the difference between the President and the White House, noting that “often when I refer to ‘the President’ in this Article, I am really speaking of a more nearly institutional actor — the President *and* his immediate policy advisors in OMB and the White House.” Kagan, *supra* note 3, at 2338. Kagan even promised a “future article” that would “delve more deeply into . . . the black box of the EOP [and] examin[e] this office as itself an administrative agency and explor[e] the relationships (in part influenced by legal rules) among the President and all the EOP’s constituent parts.” *Id.* at 2338 n.352. Terry Moe is more sanguine, conceding that politicization carries “knowledge demands” that are “not negligible,” but arguing that “the president will find politicization irresistible” in part because “[i]t assumes no sophisticated institutional designs and little ability to predict the future.” Moe, *supra* note 12, at 245.

impactful. These questions do not present easy or obvious answers.¹³⁶ Given the difficulty of the questions and limited time and cognitive resources, the policy alternatives, risk analyses, background briefings, and political advice given by senior personnel strongly structure the President's choice set. The opportunity to present those alternatives, analyses, briefings, and advice translate directly into influence over the ultimate policy outcomes.

It is therefore essential that the individuals selected to fill positions within the administration share the President's preferences if centralization and politicization are to serve the goals of presidential oversight. As the Reagan transition team was fond of saying, "[p]eople are policy."¹³⁷ If appointees do not share the President's preferences, the most likely outcome is that the decision will be made by the appointee, contrary to presidential preferences, because the President does not know that the decision is being made and the appointee does not know the President's preferences. Given the vast scope of the administrative state, the sheer mass of decisions to be made, and the limited communication between the President and even extremely senior executive officials, mutual ignorance is the norm, not the exception. This risk is especially acute when presidential preferences differ from the programmatic positions of his or her party because appointees are likely to assume that the President endorses the party's program unless differences are clearly broadcast. Even if appointees know where the President is likely to stand on an issue, they have tools to thwart the President's goals, if they so desire. Such appointees might attempt to channel decisions away from presidential loyalists, "slow walk"¹³⁸ directives from above, short-change analysis,¹³⁹ fail to offer policy alternatives, activate political constituencies, leak information to the media, or even resign their positions and engage in external advocacy, all of which would make it difficult, if not impossible, for the President's preferences to be vindicated.

In addition to the problem of loyalty, there is a second problem of competence. Even well-intentioned central staffers who believe that they are carrying out the President's policy agenda can make extremely poor and politically damaging decisions. The Iran-Contra operation, run out of the national security offices within the Executive Office of the President, provides the classic example of centralized authority gone wrong. The

136. See Livermore & Revesz, *supra* note 34, at 1349.

137. PFIFFNER, *supra* note 14, at 94 (internal quotation marks omitted).

138. See Darren Samuelsohn, *Brass Slow-Walk Sex-Assault Orders*, POLITICO (Nov. 17, 2013, 4:15 PM), <http://www.politico.com/story/2013/11/military-sex-assault-obama-099962>.

139. See Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1771 (2013).

scheme, which involved selling arms to the Iranian army and using the proceeds to fund operations by a paramilitary group in Nicaragua, was a failure along every possible dimension and took an extraordinary political toll on the Reagan administration.¹⁴⁰ When political appointees are incompetent, it creates a double problem for the President, because the layer of removal provided by agency independence is not available. The President gains no advantage from centralization and politicization if it results in a substantial reduction of the quality of decision making on important national security or domestic policy matters. In the complex political, economic, and geopolitical environment in which the U.S. government operates, presidents cannot afford to make substantial sacrifices in competence for the sake of increased centralization of executive decision making.

Balancing the requirements of loyalty and competence in making personnel decisions is one of the most difficult challenges that presidents face.¹⁴¹ The President comes into office with 3,000 to 4,000 positions to fill,¹⁴² and the turnover of political appointees is quite high, requiring constant hiring.¹⁴³ A quarter of those positions require Senate confirmation, opening the President to ridicule or scandal if nominees fail any number of modern litmus tests.¹⁴⁴ Many of the positions involve leadership and personnel management, policy discretion, and public appearances, creating a host of opportunities to undermine the administration's policy preferences, botch important government functions, and generally create headaches for senior officials and embarrass the President. The effective use of the power of politicization requires the identification of a very large number of officials across a range of disciplines and professions who are willing to uproot their lives for short-lived, stressful, high-workload positions and who will implement the President's policy agenda with little to no supervision. The following section discusses the constraints and incentives that structure how presidents attempt to carry out that task.

140. Larry Martz et al., *"It Was My Idea": Dropping His Didn't Know Defense, Reagan Takes Credit for Contra Aid*, NEWSWEEK, May 25, 1987, at 16–19.

141. There also may be a tradeoff between centralization and competence if issue-specific agencies tend to have greater expertise. See Barkow, *supra* note 64, at 34 (explaining that "[t]he relationship between expertise and OIRA is . . . a complicated one").

142. Lewis, *supra* note 58, at 578.

143. B. Dan Wood & Miner P. Marchbanks III, *What Determines How Long Political Appointees Serve?*, 18 J. PUB. ADMIN. RES. & THEORY 375 (2007) (finding political appointees served an average of 3.48 years, with a substantial group of shorter tenures, including 25% of appointees serving less than one year, 46% serving less than two years, and only one third remaining by the end of their third year).

144. See generally INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS 161 (G. Calvin Mackenzie ed., 2001); O'Connell, *supra* note 26 (documenting increase in time to confirmation and failure rates in recent presidencies).

B. Parties and Appointments

As the number of political appointees has expanded, presidents have sought to centralize control over their selections. Whereas President Eisenhower created the Schedule C mechanism to give cabinet-level secretaries greater freedom over their personnel decisions,¹⁴⁵ subsequent administrations have exerted progressively greater centralized control. President Kennedy's three-person personnel staff has bloomed into the contemporary presidential transition team staffed by hundreds of professionals that attempts to subject every political appointee of any consequence to centralized scrutiny.¹⁴⁶ Beginning at least in the administration of President Nixon, loyalty to the President and consistency with the administration's ideological direction have been given especially high priority.¹⁴⁷ The desire to fill non-career positions with individuals who will implement the President's vision is no secret; for example, the Office of Personnel Management has stated quite directly that "[t]he President and Presidential appointees expect Schedule Cs to represent the administration's goals, viewpoints and philosophies as their own."¹⁴⁸

As traditional party organizations declined, they exerted ever less pressure on the White House in the area of personnel. During the years when the spoils system dominated, parties played the central role in allocating government employment opportunities, "parcel[ing] out control over appointments to different factions within the party after the election, with factions often given explicit control over a specific subset of nominations either by agency or region."¹⁴⁹ Dominant players within the parties—including members of Congress and high-ranking state or even municipal officials, representatives of dominant interests (such as labor unions or industrialists), and individuals holding official party positions—used government positions as a way to reward loyal party service, pay back campaign favors, and generally promote the electoral prospects of their party as well as their personal or factional interests. This relationship lasted through the Eisenhower administration.¹⁵⁰

145. LIGHT, *supra* note 53, at 45.

146. Lewis, *supra* note 58, at 585.

147. See Donald P. Moynihan & Alasdair S. Roberts, *The Triumph of Loyalty Over Competence: The Bush Administration and the Exhaustion of the Politicized Presidency*, 70 PUB. ADMIN. REV. 572, 573 (2010) (discussing personnel policies during the George W. Bush administration); Rudalevige & Lewis, *supra* note 51, at 8.

148. OFFICE OF PERS. MGMT., SCHEDULE C QUESTIONS & ANSWERS (Q'S & A'S) 4 (July 7, 2003), <http://www.dm.usda.gov/employ/exec/docs/schedule-c-qa.pdf> [<https://web.archive.org/web/20130312145532/http://www.dm.usda.gov/employ/exec/docs/schedule-c-qa.pdf>].

149. Lewis, *supra* note 58, at 584.

150. *Id.* at 585.

The symbiotic relationship between electoral support and patronage employment broke down in the mid-twentieth century alongside the traditional party organizations that had facilitated that transaction. Interactions between the White House and the in-power party transitioned accordingly. Although prior administrations had worked closely with the traditional party structures to manage the flow of patronage, the Kennedy administration broke with past practice by establishing a separate organization to manage staffing during the transition and by conducting separate searches to fill patronage and policy positions.¹⁵¹ Subsequent administrations have followed a similar course, with traditional party structures exhibiting ever diminishing influence.¹⁵²

But the decline of traditional party organizations has not resulted in a free hand for the President over personnel. Instead, the “new constellation of organizations that now dominate electoral politics . . . shap[e] and constrain[] the Presidential Personnel Office in much the same way that party organizations once did.”¹⁵³ The demands from this constellation fall into roughly three categories: diversity/representation, pure patronage, and policy patronage. In his study of presidential appointments in the post-McGovern–Fraiser reform period, Thomas J. Weko focuses on the new demands for diversity that confronted presidents. In the Carter administration, the Presidential Personnel Office “was deeply engaged in monitoring [appointments] to ensure that politically appropriate numbers of women, African-Americans, and Hispanics were appointed.”¹⁵⁴ Dissatisfaction over early appointments led to the Reagan personnel office hiring “a set of . . . campaign aides to assist . . . in handling relations with women’s groups [and] ethnic minorities (especially Hispanics).”¹⁵⁵ In the Clinton administration, the personnel team was “finely calibrated” with a group of “liaisons to feminist, African-American, Hispanic, gay, and disability groups”¹⁵⁶ to collect resumes and ensure serious consideration of identified candidates.

The consequences of this particular category of demands for presidential control are unclear. Given the limited number of appointments compared to the potential pool and the relative desirability of the positions, it is not obvious that meeting diversity goals is a major constraint. These

151. See THOMAS J. WEKO, *THE POLITICIZING PRESIDENCY: THE WHITE HOUSE PERSONNEL OFFICE, 1948–1994*, at 26 (1995).

152. Emulation of the Kennedy structure included creating separate processes for patronage and expertise positions. See *id.*

153. *Id.* at 78.

154. *Id.* at 86–87.

155. *Id.* at 98.

156. *Id.* at 100.

goals may create tension within an administration over individual appointments,¹⁵⁷ however, and the personnel who implement diversity priorities may have (or be perceived as having) loyalties that are divided between the President and “causes and constituencies outside of the White House.”¹⁵⁸

A second class of demands is for what can be called *pure patronage*. While the wholesale patronage that existed during the spoils system is no more, retail patronage remains a task for presidential appointments. Many of these demands come from applicants who “worked on the [President’s] campaign, for a state party, a member of Congress, or [an] interest group.”¹⁵⁹ These patronage seekers are less interested in a paycheck and the other basic prerequisites of a position (although of course these have value) than they are in “a job that will give them a rewarding work experience and advance their career prospects, particularly within the party or its constellation of related groups.”¹⁶⁰ With the decline of traditional party organizations, these demands now come to the White House, rather than being filtered through external channels.

Demands for pure patronage create a substantial potential tension between loyalty and competence. Professor David E. Lewis characterizes patronage seekers as largely “young, politically ambitious, [with] limited experience.”¹⁶¹ Another important class of potential patronage seekers is campaign donors, especially the so called “bundlers” that put together large pools of donations. The Center for Public Integrity found that 184 out of 556 bundlers that accounted for more than \$50,000 in campaign contributions to the 2008 Obama campaign, or their spouses, landed positions in the administration.¹⁶² Of bundlers who raised at least \$500,000, nearly 80% were appointed to “key administration posts.”¹⁶³ This group is different from that of the young and inexperienced campaign worker, and includes business owners, executives, and professionals.¹⁶⁴ Nevertheless, drawing from a highly limited pool of donors for important administration

157. *Id.* at 87 (general counsel at Department of Health, Education, and Welfare under Jimmy Carter discussing such tension).

158. *Id.* at 102.

159. DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 63 (2008); David E. Lewis, *Revisiting the Administrative Presidency: Policy, Patronage, and Agency Competence*, 39 *PRESIDENTIAL STUD.* Q. 60 (2009).

160. *Id.*

161. *Id.*

162. Fred Schulte, John Aloysius Farrell & Jeremy Borden, *Obama Rewards Big Bundlers with Jobs, Commissions, Stimulus Money, Government Contracts, and More*, *CENTER FOR PUB. INTEGRITY* (June 15, 2011, 2:00 AM), <http://www.publicintegrity.org/2011/06/15/4880/obama-rewards-big-bundlers-jobs-commissions-stimulus-money-government-contracts-and>.

163. *Id.* (internal quotation marks omitted).

164. *See generally id.*

positions creates substantial risks. These are perhaps best embodied by Michael D. Brown, who was the head of the Federal Emergency Management Agency (FEMA) during Hurricane Katrina. Brown's work history prior to his appointment at FEMA, which included a failed run for Congress, local political positions in his home state of Oklahoma, and a nine-year stint as the Commissioner of the International Arabian Horse Association, came under sustained criticism in the wake of FEMA's perceived mismanagement of the disaster response.¹⁶⁵

Perhaps ironically, the competence risks associated with pure patronage may be greatest for agencies and issues that are most valued by powerful groups within the party coalition. In an extensive analysis of political appointees during recent administrations, Lewis finds that patronage appointees tended to be targeted at agencies that are anticipated to be in agreement with the current administration.¹⁶⁶ For example, conservative agencies, such as the Small Business Administration, were targeted for patronage appointments during Republican administrations.¹⁶⁷ So even though the smooth functioning of agencies that are aligned with the interests of groups in the party coalition would seem to be one of the benefits of gaining power, presidents' patronage incentives appear to interfere with this goal.

The final class of demands on presidential appointments is *policy patronage*. Unlike pure patronage, which responds to individual desires to burnish an ambitious young person's resume or add an ambassadorship to an already accomplished executive's life experiences, policy patronage responds to the demands of organized interests for appointees who can be trusted to forward their programmatic goals.¹⁶⁸ Policy patronage demands may reflect broadly agreed-upon party priorities, but may also generate intraparty disputes. For example, Weko describes conflict during the early years of the Reagan administration over claims by "new right" politicians, publicists, and think tanks" that were concerned that "movement conservatives" were being given short shrift in favor of "Nixon-Ford retreats."¹⁶⁹ The head of Reagan's personnel office was criticized for failing to show "deep commitment to new right causes" and favoring "proven managers" drawn from the traditional Republican business

165. See Spencer S. Hsu & Susan B. Glasser, *FEMA Director Singled Out by Response Critics*, WASH. POST, Sept. 6, 2005, at A1; see also Moynihan & Roberts, *supra* note 147, at 575.

166. See LEWIS, *supra* note 159, at 133 (using Schedule C appointments as proxy for "patronage" and PAS as proxy for "policy").

167. *Id.* at 133–36.

168. Cf. PAUL P. VAN RIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE*, 327 (1958) (examining how expansion of administrative state during the New Deal created "a sort of intellectual and ideological patronage rather than the more partisan type").

169. WEKO, *supra* note 151, at 96 (internal quotation marks omitted).

constituency, rather than men and women who ‘could supply conservative intellectual leadership to the bureaucracy.’”¹⁷⁰ Especially after highly contested primaries (such as the 2008 Obama/Clinton primary), policy patronage demands may tilt toward intraparty power-allocation. But after all elections, groups within the party coalition (including those with conflicting interests) will jockey for appointees that they trust to forward their interests, and these competing demands are negotiated and balanced by the President’s personnel team.

It is in this last category of patronage, oriented toward satisfying the policy demands of interest groups, where the transition to contemporary parties has the most importance. Traditional party organizations were experts at handling demands for diversity/representativeness and patronage. Managing regional and ethnic claims to plum positions was the bread and butter of traditional party organization and the payoff for hard-fought electoral victories. Transferring those tasks to the presidency increases cognitive loads in the White House and the potential for misfiring, but does not seem to otherwise have a major effect on presidential administration. As will be discussed in the next section, however, the transition to contemporary parties, with their national, programmatic, and professionalized focus, both creates increased demands for policy patronage and provides tools for the President to settle those demands. If used wisely, these tools have the potential to enhance presidential control over agencies.

C. Performance, Politics, and the New Patronage

As described above, the primary presidential strategies for asserting control over agencies hinge on the ability to identify competent and loyal personnel to fill key policymaking positions across the federal government.¹⁷¹ Incompetent or disloyal personnel do a presidential administration no good, and in fact can cause serious problems. Responding to this challenge is a central ingredient of a successful presidency. Contemporary political parties provide presidents with four important advantages in doing so: lack of a competing power center, signaling value, policy expertise, and constituency balancing.

The first advantage is, in essence, a negative benefit—the lack of an alternative power center on personnel decisions that competes with the President for control over the allocation of political appointments. As discussed in the previous section, traditional party organization once played

170. *Id.* at 97.

171. *See supra* Part II.A.

a major role in personnel decisions made by the White House, with new presidents essentially delegating many of these decisions to party organization and party processes. With the decline of traditional party organization, this competing center of power is no longer effective.

When a President enters office, a variety of demands come into the White House, and they must be settled. In particular, there may be differences of opinion on policy direction within the network of affiliated interest groups that make up contemporary parties. Personnel decisions are a way to accommodate conflicting demands or decisively settle disputes and strike out on a definitive path. Absent some other strong coordinating mechanism, it falls to the President and presidential loyalists in the most senior political positions (such as the Chief of Staff and head of the personnel office) to make the final call. These decisions are made more or less free of any concerns about what the chair of the national party committee might think, resulting in greater leeway for the President and his or her agents.

Second, the programmatic nature of contemporary political parties provides valuable signals about the views of potential appointees. Presidents can better predict the behavior of (and rely on) their appointees if potential appointees are loyal to the party program across a broad policy domain. Of course, contemporary political parties have not eliminated intraparty disputes, which remain heated. But by many measures, the overlap between the parties—both within government and within the electorate—has largely disappeared. When selecting an appointee from a pool of applicants who have built careers with interest groups or politicians affiliated with the Republican Party, there is little concern that an administration will inadvertently choose a candidate to the left of a similarly situated candidate whose experience was with Democratic-affiliated organizations or individuals. Because parties have adopted opposed positions on almost every issue of broad public concern, and consistency with those positions has become a hallmark of party identification, the signaling value of party affiliation is large.

Professors Devins and Lewis examine the role of party affiliation in determining the behavior of bipartisan commissions on independent agencies.¹⁷² They find that the party of the commissioner is a much stronger predictor of behavior than the party of the appointing President; when bipartisan requirements require that a Republican President nominate a Democratic commissioner, the commissioner does not act as a “turncoat” but votes in line with Democratic priorities.¹⁷³ The result is that presidents

172. See Devins & Lewis, *supra* note 62.

173. *Id.* at 461.

cannot gain control over bipartisan commissions until they have been in office long enough to nominate a majority from the same party, but once that occurs, “today’s independent agencies are more likely to agree with presidential preferences” because of party polarization.¹⁷⁴

The third advantage offered by contemporary political parties is policy expertise. Political scientists have long discussed the importance of “issue networks” in contemporary governance.¹⁷⁵ These issue networks include the think tanks, advocacy organizations, foundations, and private lobbying operations that now dominate the Washington, D.C., landscape.¹⁷⁶ Although some of these actors are putatively nonpartisan, many of them nonetheless have reliable party affiliations; for example, the Center for American Progress is a Democratic-affiliated entity, while the Cato Institute is affiliated with the Republican Party. These issue networks cultivate a group of “policy activists” who are “intellectual[ly] or emotional[ly] commit[ted]” to programmatic goals and who gain deep agency or area-specific technical expertise.¹⁷⁷

This intellectual infrastructure can provide a variety of expertise-related services. Presidents can rely on issue networks to identify appointees with the depth of domain-specific knowledge and prior exposure to relevant policy questions needed to quickly translate their new authority into programmatic policy output. In addition, issue networks develop recommendations for friendly administrations and political appointees can rely on their connections for feedback and information. Further, when a hostile administration is in office, these organizations generate criticism that can be translated into a programmatic vision during electoral campaigns.

Issue networks are also involved in a fourth advantage offered by contemporary political parties: they help balance potentially conflicting constituencies. Parties are coalitions that, by necessity, include substantial diversity. As a consequence, there are always latent fracture lines.

174. *Id.*; see also Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation (Feb. 12, 2007) (unpublished manuscript), <http://dho.stanford.edu/research/partisan.pdf> (finding that cross-party appointees are more responsive to their party than to the President who appointed them). See generally Pablo T. Spiller & Santiago Urbiztondo, *Political Appointees vs. Career Civil Servants: A Multiple Principals Theory of Political Bureaucracies*, 10 EUR. J. POL. ECON. 465 (1994) (examining the role of the party in affecting principal-agent relationships among career and political appointees at agencies, the President, and Congress).

175. See Hugh Heclo, *Issue Networks and the Executive Establishment*, in *THE NEW AMERICAN POLITICAL SYSTEM* 87 (Anthony King ed., 1978). See generally James E. Skok, *Policy Issue Networks and the Public Policy Cycle: A Structural-Functional Framework for Public Administration*, 55 PUB. ADMIN. REV. 325 (1995) (arguing that issue networks play a fundamental role in determining the agenda for political institutions).

176. See generally THOMAS MEDVETZ, *THINK TANKS IN AMERICA* (2012).

177. Heclo, *supra* note 175, at 102.

Personnel decisions that inexpertly weigh competing concerns within the party can lead to substantial challenges for a president.¹⁷⁸ In the contemporary Democratic Party, unions and environmentalists are two important constituencies with interests that conflict when environmental protections threaten incumbent workers in unionized industries. On the Republican side, issues such as gay rights pit libertarians against social conservatives, two important constituencies that define the contemporary party. For both parties, there are issue-network entities that help mediate potential conflicts. On the Democratic side, an example is the BlueGreen Alliance. This organization was established by leading labor and environmental organizations specifically to help facilitate discourse and compromise between those two groups.¹⁷⁹ On the Republican side, there are entities such as the American Conservative Union, which sponsors the annual Conservative Political Action Conference—a forum where areas of policy disagreement are aired and discussed, with a broader understanding that maintaining the party coalition is of primary importance.¹⁸⁰

These coalition-maintaining efforts help presidents avoid intraparty conflicts over personnel decisions and cultivate potential appointees who have expertise in balancing conflicting demands within the party. Through experience with the BlueGreen Alliance and similar activities, policy activists within the environmental movement develop personal relationships within organized labor and form policy perspectives that

178. For example, Republican EPA Administrators have traditionally been called on to balance the desires of the northeastern wing of the party, which had strong environmentalist tendencies, against the antiregulatory demands of industry and libertarian western elements of the party. This intraparty conflict often results in intra-administration conflict. After Reagan EPA Administrator Ann Gorsuch—who took a hostile approach to the agency’s mission—was forced to resign amid scandal, the administration faced sufficient pressure on environmental issues that it ultimately appointed William D. Ruckelshaus, an environmentalist icon from the Nixon administration. The EPA Administrator under George H.W. Bush, William K. Reilly, regularly clashed with other political appointees in the White House, especially the Council on Competitiveness, chaired by Vice President Dan Quayle. See *William K. Reilly: Oral History Interview*, U.S. ENVTL. PROTECTION AGENCY (Sept. 1995), <http://www2.epa.gov/aboutepa/william-k-reilly-oral-history-interview>. Christine Todd Whitman, EPA Administrator under George W. Bush, also clashed with the White House, and eventually resigned after being overruled on a major environmental rulemaking. See Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST, June 27, 2007, at A1.

179. See generally *About Us*, BLUEGREEN ALLIANCE, <http://www.bluegreenalliance.org/about> (last visited Sept. 25, 2015) (“The BlueGreen Alliance unites America’s largest labor unions and its most influential environmental organizations to identify ways today’s environmental challenges can create and maintain quality jobs and build a stronger, fairer economy.” (emphasis omitted)).

180. For example, conflicts within the Republican coalition over the issue of gay rights periodically break out in the context of the American Conservative Union’s annual conference, with gay rights-oriented groups arguing that they have been excluded from this premier party event. See, e.g., David McCabe, *Gay GOP Group Says It’s Being Excluded from CPAC*, THE HILL (Feb. 20, 2015, 2:39 PM), <http://thehill.com/blogs/blog-briefing-room/233356-gay-gop-group-says-theyre-being-excluded-from-conservative-confab>. These conflicts can be understood as a means of mediating the inherent tensions within a party that includes libertarians as well as social conservatives.

incorporate these sometimes competing demands. Similarly, exposure to the wide range of Republican Party constituencies through entities such as the American Conservative Union helps cultivate foreign policy hawks who understand the concerns of deficit hawks and tax hawks—all of whom have conflicting policy desires but must learn to collaborate to develop a party program that is mutually acceptable.

Contemporary parties that can supply a group of readily identifiable technocrats who are committed to a consistent set of policy initiatives associated with a party program and who have experience balancing the interests of the party's various constituencies provide an extremely valuable service for presidents as they exercise their appointment power. It is hard to image anything more useful for an incoming Executive than an extensive network of committed, well-trained, enthusiastic, and loyal potential personnel to fill vital, difficult-to-supervise, and controversial roles. To the degree that contemporary parties are well suited to supplying that network, they will facilitate, to a great degree, the reality of presidential oversight.

III. PARTIES AND PRESIDENTIAL REPRESENTATION

Critics of the trends toward presidential administration argue that an expansive role for the President, political appointees, and the White House threatens administrative, constitutional, and democratic values.¹⁸¹ Defenders of presidential power frequently respond to these critiques by pointing to the virtues of the presidency, and in particular to the President's unique connection to the national electorate. Under this presidential representation hypothesis, greater presidential influence in the administrative state promotes majoritarian values by subjecting agencies—at least indirectly—to electoral accountability.¹⁸² In *Chevron*, the Court adopted a version of this logic, arguing that agencies may “properly rely upon the incumbent administration's views of wise policy to inform its judgments” because, “[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this

181. See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); Barkow, *supra* note 64, at 23; Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 *FORDHAM URB. L.J.* 1097 (2006).

182. See generally Bressman, *supra* note 67 (discussing the majoritarian defense of presidential control); DeMuth & Ginsburg, *supra* note 49; Kagan, *supra* note 3; see also Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 *DUKE L.J.* 1180, 1193–94 (1994) (arguing that the national constituency provides the President with a comparative advantage for regulatory reform because the President is “less vulnerable to targeted appeals by interest groups” and because the President is “[n]ot plagued by the difficulties associated with collective decisionmaking”).

political branch of the government to make such policy choices.”¹⁸³ Similar notes remain frequently sounded by the courts.

But the normative attractiveness of this justification for presidential power depends on the structure of presidential electoral politics, including the role of contemporary parties in nominating and supporting presidential candidates. If the nomination process screens for candidates with preferences that are substantially different from those of typical voters, or if the electoral process favors narrow, organized interests at the expense of the public, the presidential representation rationale for presidential oversight of agencies loses much of its normative attractiveness. As strong parties reemerged at the end of the twentieth century, a debate arose in the political science literature about whether contemporary parties are dominated by politicians or groups. Research on that question bears directly on the viability of the presidential representation hypothesis, and is the subject of this Part.

A. *A Simple Model of Presidential Representation*

The presidential representation hypothesis has been highly influential, taking on the aspect of a “mystique” or “unifying theory” in defense of expanded presidential power over agencies.¹⁸⁴ In addition to the Court in *Chevron*, the presidential representation basis for presidential power over agencies has been embraced in some form by a long list of luminaries across the political spectrum, including Justice Elena Kagan,¹⁸⁵ Judge Frank Easterbrook,¹⁸⁶ Judge Douglas Ginsburg,¹⁸⁷ and Professors Jerry L. Mashaw,¹⁸⁸ Lawrence Lessig, and Cass Sunstein.¹⁸⁹

The normative force of the claim stems from an understanding of presidential control as a means of binding agency decisions to majority

183. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

184. See Bressman, *supra* note 67, at 478 (“unifying theory”); Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 35–36 (2007) (referring to a “presidential mystique” that supports expanded presidential control over agencies); see also HAROLD SEIDMAN, POLITICS, POSITION, AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION (2 ed. 1975).

185. Kagan, *supra* note 3.

186. Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1341 (1994).

187. DeMuth & Ginsburg, *supra* note 49.

188. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 90 (1985).

189. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 101 (1994).

preferences.¹⁹⁰ In a highly simplified way, the goal of political oversight could be thought of as translating the preferences of the median voter into regulatory policy.¹⁹¹ In a basic model of politics, if a slate of regulatory proposals were offered up for general majority vote, the proposal closest to the median voter's preferences would dominate.¹⁹² If the President's preferences match those of the median voter, then making agencies responsive to presidential preferences will replicate the outcomes that would have been generated by a plebiscite.¹⁹³

Of course, the President as a proxy for the median voter is a somewhat crude expression of presidential representation hypothesis. Presidents have access to information that the median voter does not, and their role is not merely to serve as a pass-through for the electorate. Policy choices cannot always (or even often) be reduced to the simplified model that allows a median voter to emerge; there may be multiple dimensions along which choices must be made such that no clear winner emerges from a majority vote.¹⁹⁴ The median-voter model (and majority choice in general) does not account for the strength of preferences, and there are normative models of

190. The presidential representation hypothesis is functionally very similar to the "faction reduction" argument for presidential power that is also commonly made. See Bressman, *supra* note 67, at 491; Cooper & West, *supra* note 49, at 871; Christopher C. DeMuth, *A Strategy for Regulatory Reform*, REG.: AEI J. ON GOV'T & SOC'Y, Mar.-Apr. 1984, at 25, 27 (the President's "own staff . . . evaluate[s] each regulation, relatively free of the interest-group pressures faced by the regulatory agencies"); see also Livermore & Revesz, *supra* note 34, at 1344-50 (surveying capture-based justifications for presidential influence over agencies).

191. Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 139 (1957). Alternatively, the policy goal might be to maximize a social welfare function, based on the preferences of the citizenry, with political oversight by an electorally accountable President as the best means to steer agencies in that direction. See, e.g., Bressman, *supra* note 67, at 490 n.145 (noting that cost-benefit analysis, a major feature of centralized regulatory oversight, "can be understood to ask agencies directly to consider popular preferences in policymaking"); DeMuth & Ginsburg, *supra* note 49, at 1081 (arguing that there is a connection between the President's preferences and efficiency criteria). See generally MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS (2012) (defending a particular version of the social welfare function that is tied to actual citizen preferences, but more loosely than traditional cost-benefit analysis).

192. This basic model is highly simplified, and the existence of multiple dimensions of preferences for the slate of proposals can result in no clear winner in a set of pairwise votes. See generally Peter J. Coughlin, *Single-Peaked Preferences and Median Voter Theorems*, in 2 THE ENCYCLOPEDIA OF PUBLIC CHOICE 524 (Charles K. Rowley & Friedrich Schneider eds., 2004).

193. Adler refers to a policy bearing the "Plebiscitary Feature" if it "would be chosen by a majority of the citizens in some kind of hypothetical plebiscite." Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 789 (1997). Adler argues that this concept undergirds claims of a countermajoritarian difficulty of both statutes and regulation. *Id.* at 788-96.

194. See generally Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950).

policy-making that require departure from median preferences when they conflict with individual rights or undermine aggregate well-being.¹⁹⁵

Nevertheless, a rough concept of a median voter provides a useful simplification of the presidential representation hypothesis. Certainly, *some* connection between the President and the preference of the electorate is required to support the presidential representation hypothesis.¹⁹⁶ The presidential representation hypothesis is meant to legitimate presidential power, and some relationship to democratic values is necessary. The median-voter model provides a first approximation to evaluate presidential representativeness.¹⁹⁷ To the extent that presidents are expected to systematically diverge from the preferences of the median voter, presidential-control skeptics would be warranted in demanding an explanation that accords with some normative vision of democratic responsiveness.¹⁹⁸

The median-voter model also helpfully provides a mechanism to connect the normative goal—policies that approximate those that would be chosen through majority vote—and the means for achieving it—agency responsiveness to a President who is selected through majority vote. If the hypothesis is correct, then the President’s policy choices will generally sit toward the middle of electoral preferences, with roughly equal percentages of voters on either side, because that is how presidents win elections. Enhancing the influence of the President would thus bring agency policies toward the center.

There are many potential ways for this mechanism to break down, driving presidential preferences away from the median voter in the national electorate. As an initial matter, presidents are not selected through a general

195. A standard social welfare function can generate different results than a simple majority vote on policy choices. *See generally* ADLER, *supra* note 191. For a less preference-based account, see AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

196. This is especially the case if the majoritarian character of the President is meant to counteract the countermajoritarian difficulty faced by courts and agencies. *See* Bressman, *supra* note 67, at 464–65. An alternative “transformative” conception of the presidency is not quite as tied to existing preferences as a median-voter model, but nonetheless remains linked to desires within the polity. *See* Stephen Skowronek, *Twentieth-Century Remedies*, 94 B.U. L. REV. 795, 801 (2014).

197. Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 287 (2014) (“[A]n impressive range of thinkers have made the normative argument that the preferences of voters ought to be aligned with those of their representatives—and that elections are the key instrument for producing this alignment.”).

198. ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION 1* (1971) (“[A] key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.”). Presidents and other legal actors are also, either intentionally or incidentally, involved in preference formation. For discussion of resulting complexities for democratic theory, compare John Ferejohn, *Must Preferences Be Respected in a Democracy?*, in *THE IDEA OF DEMOCRACY* 231 (David Copp et al. eds., 1993), with Cass R. Sunstein, *Democracy and Shifting Preferences*, in *THE IDEA OF DEMOCRACY*, *supra*, at 196.

nationwide popular vote, and the Electoral College could create incentives for presidents to favor certain “swing” regions of the country. In their forthcoming book, *The Particularistic President*, Douglas Kriner and Andrew Reeves examine how presidents focus their attention on electorally important sections of the country, using data on “federal grant spending, natural disaster declarations, and military base closures to show the powerful influence of particularistic impulses on presidential policymaking.”¹⁹⁹ What they find is that “the policy consequences of this particularism are stark, in many cases producing inequalities in the allocation of federal resources that exceed those produced by Congress.”²⁰⁰ Regional electoral incentives, then, can drive presidential allocation and policy choices away from the preferences of the median voter.

The system of private campaign finance may drive presidents to pursue the median donor rather than the median voter. Presidential campaigns are enormously expensive; spending on both the 2008 and 2012 elections topped \$2.5 billion.²⁰¹ A tiny fraction of Americans provide the lion’s share of donations; 0.53% of the U.S. voting-age population made a political contribution of more than \$200 in 2012, but donors in that category accounted for more than 60% of total campaign contributions.²⁰² Unsurprisingly, research has found that donors to political campaigns are not drawn randomly from the population; they are wealthier and tend to have distinct policy views.²⁰³

Concerns about the intersection of income inequality and political participation have led to a sustained research effort to examine the relationship between the two. In 2004, a Task Force on Inequality and American Democracy was convened by the American Political Science Association (APSA) to examine the question. The APSA ultimately released a report and edited volume that raise concerns that “[t]he political playing field [is] highly unequal.”²⁰⁴ Using data on congressional voting

199. Douglas Kriner & Andrew Reeves, *The Electoral College and Presidential Particularism*, 94 B.U. L. REV. 741, 752 (2014) (describing the book).

200. *Id.*

201. *The Money Behind the Elections*, OPENSECRETS.ORG, <http://www.opensecrets.org/bigpicture/> (last visited Sept. 25, 2015).

202. *Donor Demographics*, OPENSECRETS.ORG, <http://www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012> (last visited Sept. 25, 2015).

203. See Stephanopoulos, *supra* note 197, at 339 (citing studies showing differences in donor preferences compared to the population as a whole).

204. Lawrence R. Jacobs & Theda Skocpol, *American Democracy in an Era of Rising Inequality*, in *INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN* 1, 12 (Lawrence R. Jacobs & Theda Skocpol eds., 2005); see *TASK FORCE ON INEQUALITY AND AM. DEMOCRACY*, AM. POLITICAL SCIENCE ASS’N, *AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY* (2004), <http://www.apsanet.org/portals/54/Files/Task%20Force%20Reports/taskforce%20report.pdf>.

records and other public policy outputs as well as survey responses within the general population, researchers have found that politicians are relatively more responsive to wealthy constituents.²⁰⁵ Certain research has found relatively little divergence on policy matters by income,²⁰⁶ but studies that have specifically targeted the wealthiest Americans have found stark differences on policy positions as well as substantially greater levels of political participation.²⁰⁷ The most recent research, which uses more extensive data on policy attitudes within the population, finds substantially greater policy responsiveness to the preferences of the wealthy, especially within the Republican Party.²⁰⁸

Most relevant for the following discussion is the role of two-stage elections, in which candidates first vie for the nomination of one of the two major political parties, and then proceed to a general election. Under some models of political parties in which electoral success is the ultimate end, parties gravitate toward candidates who reflect median preferences.²⁰⁹ But even when electoral success is paramount, the need to raise funds may give outsized influence to donors,²¹⁰ and politicians may additionally benefit from distinctive policy “brand,” which requires differentiation and some

205. See LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2010); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012); Lawrence R. Jacobs & Benjamin I. Page, *Who Influences U.S. Foreign Policy?*, 99 AM. POL. SCI. REV. 107 (2005); see also SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* (1995) (discussing income-, wealth-, and education-related disparities in participation in “civic voluntarism”).

206. See Yosef Bhatti & Robert S. Erikson, *How Poorly Are the Poor Represented in the U.S. Senate?*, in WHO GETS REPRESENTED? 223 (Peter K. Enns & Christopher Wlezien eds., 2011); Stuart N. Soroka & Christopher Wlezien, *On the Limits to Inequality in Representation*, 41 PS: POL. SCI. & POL. 319 (2008); Joseph Daniel Ura & Christopher R. Ellis, *Income, Preferences, and the Dynamics of Policy Responsiveness*, 41 PS: POL. SCI. & POL. 785 (2008).

207. See Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51 (2013).

208. See Jesse H. Rhodes & Brian F. Schaffner, *Economic Inequality and Representation in the U.S. House: A New Approach Using Population-Level Data* (Apr. 7, 2013) (unpublished manuscript) (on file with the Alabama Law Review).

209. Downs, *supra* note 191.

210. See David P. Baron, *Electoral Competition with Informed and Uniformed Voters*, 88 AM. POL. SCI. REV. 33 (1997) (describing conditions that will lead to divergence from median preferences and toward donor preference). See also Timothy Feddersen & Faruk Gul, *Polarization and Income Inequality: A Dynamic Model of Unequal Democracy* (2014) (unpublished manuscript) (showing polarization resulting from a need for policy-oriented politicians to compete for both donors and votes, in conditions of economic inequality and income-based policy divergence). See generally KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012) (discussing interaction of campaign finance, interest groups, and parties on political representation); THOMAS FERGUSON, *GOLDEN RULE: THE INVESTMENT THEORY OF PARTY COMPETITION AND THE LOGIC OF MONEY-DRIVEN POLITICAL SYSTEMS* (1995) (arguing that political parties represent left and right branches of coalition of moneyed elites that vie for political office).

distance from median preferences.²¹¹ Still other models view electoral success as merely the means to the end of achieving benefits for members of the party coalition. Given this different set of goals, parties will use the nomination process to screen for candidates who will deliver those benefits, subject to the constraint of gaining a bare majority on election night.

These competing models of the presidential nomination process have obvious implications for the presidential representation hypothesis. If the former, electoral-success model is correct, then presidents can be expected to occupy the center on the political spectrum. If the latter, party-coalition-benefits model is more accurate, then presidents will instead reflect the narrow interests of the party coalition.

These competing models of the presidential nomination process have obvious implications for the presidential representation hypothesis. Under some, presidents can be expected to occupy the center on the political spectrum, and the presidential representation hypothesis has some validity. If other alternatives are more accurate, then presidential preferences will not occupy the political center, and the standard justification for presidential oversight breaks down. With the decline of traditional party organizations and the rise of contemporary parties discussed in Part I.C, political scientists began to ask which model better characterizes contemporary presidential nomination politics. It is to their competing answers to this question that this Article now turns.

B. Politicians and Groups in Political Parties

This section evaluates the presidential representation hypothesis in light of current thinking within the political science literature on the role of parties in the nomination process. The conclusion is that the presidential representation hypothesis finds little support, even under the most favorable interpretation of contemporary parties. If a strong role for the President in agency oversight is justified, it must find alternative normative foundations.

For Aldrich, the 1960 presidential election marked the dawn of candidate-centered elections, in which the resources of traditional party organizations were no longer necessary to mount a successful presidential bid. But if John F. Kennedy proved that candidates could create the campaign operations needed to win a general election, it was Jimmy Carter's successful contest for the 1974 Democratic nomination that raised the question of whether party insiders were able to exercise any substantial influence over even the nomination process for the single most important

211. See generally Aldrich, *supra* note 6.

elected office in the country. The seeming irrelevance of party insiders in the primary-driven presidential nomination process contributed to the view that the era of party politics had been supplanted by one in which elections would center on the candidates themselves.²¹²

An era of candidate-centered elections is consistent with a model of politician-centered parties, in which electoral success is the ultimate goal of the party. In his highly influential rational-choice model of politics, Anthony Downs defines a party as a “team . . . who seek[s] office solely in order to enjoy the income, prestige, and power that go with running the governing apparatus.”²¹³ Such parties “do not seek to gain office in order to carry out certain preconceived policies[,] . . . rather they formulate policies . . . to gain office.”²¹⁴ This understanding of parties led Downs to the median-voter conclusion—parties that are exclusively concerned with holding office will seek to maximize their share of total votes, and will do so by locating themselves at the preferred preferences of the median voter.²¹⁵

Joseph A. Schlesinger provided an important extension on Downs’s work by elaborating on how parties coordinate the members of the “team,” recognizing the importance of “benefits seekers” that provide inputs into electoral success. These benefits seekers have different electoral goals, and they attempt to pursue them by pushing the party toward a minimum winning coalition, rather than by maximizing vote shares.²¹⁶ The tension between the benefits seekers and politicians arises when “the two goals [] impose conflicting views of how to win elections and, ultimately, conflicting views of how parties should be organized.”²¹⁷ Although Schlesinger recognizes the importance of benefits seekers, he ultimately “assert[s] that no matter how intense the struggle, the goal of office and the office seeker will ultimately prevail.”²¹⁸ As a consequence, parties will generally attempt to maximize vote shares through appeals to the political center. Demsetz describes a similar structure of balancing the preferences of “internal constituencies” (i.e., party leaders, members, and supporters)

212. MARTIN P. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES, 1952–1996* (5th ed. 1998).

213. Downs, *supra* note 191, at 137.

214. *Id.*

215. *Id.*

216. JOSEPH A. SCHLESINGER, *POLITICAL PARTIES AND THE WINNING OF OFFICE* 157 (1991).

217. *Id.* at 148.

218. *Id.* Schlesinger also provides an account of “centrifugal” and “centripetal” pressures on political parties, essentially arguing that party coordination will decline (centrifugal behavior) when the benefits of incumbency dominate and electoral competition declines, while party coordination (centripetal behavior) will increase as electoral competition increases. Schlesinger argues that changes in the electorate mid-century switched incentives in ways that led to increased centripetal pressure, contributing to more coordinated parties after the 1960s. *See id.* at 177–99.

and external constituencies (i.e., voters).²¹⁹ But Demsetz concludes that parties will not seek to maximize vote share and drift away from the political center.²²⁰

Group-centered theories emphasize the benefits seekers and view parties as primarily collections of interest groups that form coalitions to use influence over the electoral process to effectuate policy change. Influenced by pluralistic political theory, an earlier version of the group-centered approach was prominent during the New Deal period but fell out of favor for several decades.²²¹ The transition of parties in the past twenty-five years has spurred a recent renaissance.²²² In one account, contemporary parties are composed of “intense policy demanders” made up of “interest groups and activists” who work in coalition to

develop[] an agenda of mutually acceptable policies, insist[] on the nomination of candidates with a demonstrated commitment to [the party] program, and work[] to elect these candidates to office. In this group-centric view of parties, candidates will, if the coalition has selected them well, have as their paramount goal the advancement of the party program.²²³

The group-centered approach paints a less “rosy” picture of the role of parties in a democratic system.²²⁴ Rather than forward politicians’ goals of maximizing electoral success—which ultimately translates into responsiveness to voter demands—parties are meant to help interest groups “capture and use government for their particular goals” through any (legal) means necessary, including by taking advantage of voter inattention.²²⁵ Under group-centered accounts, intense policy demanders impose discipline on politicians through the primary process and by cultivating candidates who have strong personal commitments to the party program.

219. *See id.* at 149–51.

220. Harold Demsetz, *Amenity Potential, Indivisibilities, and Political Competition*, in *PERSPECTIVES ON POSITIVE POLITICAL ECONOMY* 144, 149 (James E. Alt & Kenneth A. Shepsle eds., 1990).

221. *See, e.g.*, KEY, *supra* note 124.

222. *See* COHEN ET AL., *supra* note 10.

223. Bawn et al., *supra* note 18, at 571, 591.

224. *Id.* at 571. Note that the group-centered descriptive account is different from normative models from a different time, which accentuated the role of parties in facilitating pluralistic representation through interest group bargaining. *Cf.* KEY, *supra* note 124. Parties dominated by intense policy demanders are unlikely, as an empirical matter, to act as conduits for genuine pluralistic representation because only some factions will be strongly represented. *Cf.* COHEN ET AL., *supra* note 10; Bawn et al., *supra* note 18.

225. *Id.*

This second mechanism would be effective even for presidents, who are unlikely to face primary challenges once elected.

Aldrich's account of parties attempts to harmonize a rational-choice, politician-centered understanding of political parties with the role of benefits-seeking activists in contemporary parties and a more realistic behavioral account of the motivations for office-seeking.²²⁶ Part of what drives party maintenance in an era of candidate-centered elections is the value of a party brand that signals a particular set of programmatic positions. This signal is only valuable to the extent that it is coherent, understandable by the public, and distinct from the other party. When this signaling function is important, parties tend to "polarize" by adopting distinct programs that are used to recruit politicians and engage the activist base of volunteers and donors. The party signal is a public good that is shared by all affiliated politicians, and the contemporary party is a mechanism to organize those politicians to produce and amplify that signal, in light of collective-action challenges.²²⁷

An additional complication for the presidential representation hypothesis is growing partisanship within the electorate. The Downsian median-voter model anticipates a relatively normal distribution of political preferences along a common dimension, in which there is a relatively large group of people in the middle with moderate preferences, and diminishing populations toward the extremes. Some recent research suggests that partisanship within the electorate has resulted in a distribution of preferences with a Republican distribution on the right, a Democratic distribution on the left, and a relatively small population in the center.²²⁸ If the electorate is divided in this way, and has some degree of partisan loyalty, it is not clear that reaching toward the center will be the most successful electoral strategy. Others argue that polarization is largely an elite phenomenon, and that there remains a large center within the American electorate.²²⁹

It is unlikely that contemporary parties are either purely group-centered or politician-centered. Rather, a party at a given time might be characterized as relatively more group- or politician-centered, depending on the temporary allocation of power, even as neither politicians nor groups are entirely shut out. Allocation of power within a party between politicians and groups will be affected by institutional arrangements (such as the

226. *See generally* ALDRICH, *supra* note 6.

227. *Id.*

228. *See, e.g.*, ALAN I. ABRAMOWITZ, *THE POLARIZED PUBLIC: WHY AMERICAN GOVERNMENT IS SO DYSFUNCTIONAL* (2012).

229. *See, e.g.*, MORRIS P. FIORINA & SAMUEL J. ABRAMS, *DISCONNECT: THE BREAKDOWN OF REPRESENTATION IN AMERICAN POLITICS* (2009).

structure of primaries), communications technologies, fundraising rules, and the charismatic qualities of individual politicians.²³⁰

One feature of contemporary parties that are not well captured by the two dominant accounts is the outsized role of one particular politician—the President. In addition to sitting at the head of the Executive Branch, presidents are the functional leaders of their parties while in office, and typically continue to engage in substantial party-building activities outside of office. Presidents bring different styles of partisanship to their jobs, and tend to leave lasting imprints on their parties.²³¹ Realistically, there might be thought to be *three* distinct centers of gravity within parties: benefit-seeking interest; office-seeking politicians; and presidents. The latter center of gravity is, perhaps, the most difficult to understand because presidents are individuals rather than collectives—idiosyncratic motivations and personal style are less likely to be swamped by systematic pressures.

From the perspective of political control over agencies, when parties are relatively more group-centered, presidential oversight powers will be used to favor agency decisions that depart from those of the median voter.²³² Even more politician-centered parties, which may select candidates who are *relatively* more responsive to voters and who will be *relatively* more likely to use presidential oversight to push agencies toward the center, are unlikely to truly track median voter preferences.²³³ Presidentially centered parties will respond to the personal preferences of the President, which may be oriented to voters, partisans, or historical legacy, depending on the temperament of the person in the White House. None of these theories of parties, then, well-accords with the presidential representation hypothesis.

230. Andrea Louise Campbell, *Parties, Electoral Participation, and Shifting Voting Blocs*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 68, 68 (Paul Pierson & Theda Skocpol eds., 2007).

231. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (2d ed., 1997); Sidney M. Milkis, Jesse H. Rhodes & Emily J. Charnock, *What Happened to Post-Partisanship? Barack Obama and the New American Party System*, 10 *PERSPECTIVES ON POLITICS* 57 (2012).

232. Of course, if administrative policy outputs are too extreme, then the party may suffer electoral consequences, so voters act as a check on even group-centered parties.

233. Kagan acknowledged that the normative case for presidential control is weak if presidents are pulled away from majority preferences by party demands. See Kagan, *supra* note 3. To counter that argument, she includes a citation to “scholarly commentary on past Presidents’ relative lack of partisanship.” See *id.* at 2311 n.261 (citing Milkis, *supra* note 115); Austin Ranney, *The President and His Party*, in *BOTH ENDS OF THE AVENUE: THE PRESIDENCY, THE EXECUTIVE BRANCH AND CONGRESS IN THE 1980S*, at 131 (Anthony King ed., 1983).

One strategy to test how theory matches reality is to examine the nomination process.²³⁴ Truly politician-centered parties would acquiesce to the strongest candidate (i.e., the candidate who best tracks median preferences), while group-centered parties screen candidates on the basis of loyalty to groups in the coalition, even at the risk of electoral defeat.²³⁵ In a significant study of presidential primaries in the contemporary period, Cohen, Karol, Noel, and Zaller find that a group-centered theory of presidential nominations is better supported.²³⁶

The Cohen et al. study takes as its starting place what the authors refer to as the “invisible primary,” which occurs prior to any public vote.²³⁷ The function of this invisible primary is to simulate the insider nomination process that existed prior to the reforms in the nomination process in the wake of the 1968 Democratic convention. In the invisible primary, intense policy demanders operate through informal party networks to screen potential presidential candidates for acceptability. Although electability is one of the criteria applied to candidates, conformity with the policy goals of groups within the party coalition is at least as important, and groups trade electoral risk against candidate fidelity to their interests.

Because the invisible primary is difficult to observe directly, Cohen et al. use endorsements by high-profile party figures—namely prominent elected officials—as a proxy for this process. The authors do not assume that endorsements themselves operate to effectively screen candidates, but instead that prominent endorsements are responsive to the same general forces that operate in the invisible primary. Gathering data on pre-primary endorsements in the period from 1980 to 2008, they find that in the vast majority of cases, the candidates with the largest number of endorsements going into the primary season were the party’s ultimate nominee. Based on this data, they conclude that “[r]ank-and-file voters possess the formal power to nominate, but they normally follow the insider consensus.”²³⁸

One potentially interesting wrinkle in this data is that more recent presidential elections, especially on the Democratic side, break this trend. Both John Kerry and Barack Obama enjoyed substantially less support from Democratic Party insiders in the lead-up to the primary season, but

234. See SETH E. MASKET, *NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES* (2009) (arguing that informal organizations have an extremely important role in nominations).

235. For contemporary examples of willingness to risk losses in general elections to promote adherence to policy programs, see THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* (2012).

236. COHEN ET AL., *supra* note 10.

237. Much of their analysis is based on data concerning public endorsements of primary candidates by elected officials.

238. Bawn et al., *supra* note 18, at 586 (summarizing COHEN ET AL., *supra* note 10).

both emerged as the party's eventual candidate. Indeed, both lagged behind two other candidates in early endorsements (Kerry behind Gephardt and Dean; Obama behind Clinton and Edwards). John McCain was also deemed unacceptable to a substantial percentage of Republican Party insiders but gained the nomination in 2008.²³⁹ Distrust of Mitt Romney was also widespread within the Republican Party, and although he eventually captured the nomination, it was only after a costly battle. These recent examples in both parties indicate that the trend identified by Cohen et al. of strong insider influence over the nomination process may be fading.

Other lines of research also tend to indicate that presidents are not well described as proxies for the median voter. In an extensive study of presidential behavior, B. Dan Wood codes "every sentence spoken publicly by the president" from President Truman through the end of the first term of President George W. Bush along nine issue domains according to a conservative and liberal axis.²⁴⁰ The relative liberalness of presidential statements are then compared to polling data on public sentiment to test how well the centrist model explains the public positions of sitting presidents. Wood finds that "presidents do not cater systematically to mass preferences" but instead "consistently express partisan issue stances."²⁴¹ He further finds that presidents are "unresponsive to incentives from changing public approval and elections" and that the main determinants of the liberalisms of presidential statements are "partisanship . . . tempered by pragmatic concerns," including the economic condition of the country and the partisan composition of Congress.²⁴² Wood's finding provides support for a group-centered model in which presidents cater to their base, rather than reach for the center. The expectation of partisan behavior by presidents may help explain why "off-side plays"—where presidents adopt policies at odds with their party program—are such "effective maneuvers when deployed."²⁴³ The relative rarity of such moves attests to the general regularity of presidential conformity to their partisan commitments.

239. McCain's nomination was made possible by particularly strong showings in New Hampshire and South Carolina, which have open primaries. Open primaries have some constitutional limits. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (upholding a "modified blanket primary" that allowed a candidate to affiliate with the party of his choosing on a general ballot); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (invalidating California's blanket primary system as violation of freedom of association).

240. B. DAN WOOD, *THE MYTH OF PRESIDENTIAL REPRESENTATION* 67 (2009).

241. *Id.* at 118.

242. *Id.* at 118–19. *See also* Kevin Coe, *The Language of Freedom in the American Presidency, 1933-2006*, 37 *PRESIDENTIAL STUD. Q.* 375 (2007) (noting partisan difference in how presidents discuss the concept of "freedom").

243. Robert E. Goodin, *Voting Through the Looking Glass*, 77 *AM. POL. SCI. REV.* 420 (1983).

Overall, there is very little theoretical and empirical support in the literature on contemporary parties for the presidential representation hypothesis. Under group-centered accounts of parties, presidents will use their oversight powers to promote the interests of activist party constituencies with extreme policy preferences. Even under politician-centered accounts, the need to build a party brand and respond to partisanship within the electorate will drive presidents away from the preferences of median voters. Available evidence is consistent with these theoretical predictions. In the main, party insiders play an important role in selected presidential nominees, and once in office, presidents appear to take positions that are consistent with their party programs, rather than occupying the political center. Given the weakness of the presidential representation hypothesis, it provides an inadequate justification for the strong role currently given to presidents to oversee the administrative state.

C. *Responsible Party Government*

A simple median-voter proxy model of presidential representation as a defense for presidential administration is unsatisfying. At the very least, the Electoral College and the system of private campaign finance potentially distort presidential priorities toward particular regions or socio-economic groups. More centrally for the analysis in this Article, the two-party system—coupled with parties that are at least somewhat responsive to internal constituencies rather than voters—implies that presidents will adopt positions at some distance from the median voter.²⁴⁴ Perhaps *on average* the center is represented, but one is reminded of the joke about the statistician with his head in an oven and his feet in a bucket of ice; when asked how he felt, he said: “On average, I feel just fine.”²⁴⁵

The era of candidate-centered elections has not solved this problem. The legal, technological, and cultural changes that led to the breakdown of traditional party organizations has not resulted in purely politician-dominated parties that seek to maximize their vote share by tracking median preferences. Party insiders appear to continue to exercise at least some degree of control over presidential nominations, although the extent of their influence is subject to debate. Presidents, at least in their public statements, do not appear simply to track public preferences, but instead

244. Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (arguing that some degree of insulation may be justified).

245. Dr. Gary C. Ramseyer, *Sir Ronald A. Fisher Hall*, ILL. ST. U., <http://my.ilstu.edu/~gcr Ramseyer/FisherHall.html> (last visited Sept. 25, 2015) (describing the joke as the “granddaddy” of statistics humor).

represent the mainstream view of their parties. Any satisfying justification for presidential administration must fit with this reality.

A useful starting place for squaring presidential administration with the realities of party politics is a normative understanding of political parties and their role in democratic societies. Political scientists have long noted the benefits of political parties: they facilitate the electoral process by reducing the costs of voting, recruiting candidates, and encouraging voters; they professionalize the political class by providing job security; they increase capacity for governance, develop policy proposals, and coordinate constitutionally fractured government authority; and they mediate conflict between existing social groups and create opportunities for outsiders to gain influence.²⁴⁶ Without political parties, it is unclear how the basic machinery of elections and governing would be accomplished. From a functional standpoint, political parties are basic components of a workable democratic society.

One articulation of the normative role for parties in democratic societies is the “responsible party government” account, described mid-twentieth century by E.E. Schattschneider and an American Political Science Association committee that he chaired.²⁴⁷ The basic components of responsible party government are two parties that are genuinely competitive, are sufficiently different to provide voters with a choice, and that announce policy programs and carry them out while in office or criticize the party in power when out of office.²⁴⁸ Under this model, parties are able to overcome some of the stagnation and gridlock inherent in the American separation-of-powers system and play an essential role in facilitating democratic accountability by developing slates of policy proposals, putting them up for a vote, and standing on their records of accomplishment.²⁴⁹ For Aldrich, contemporary political parties are well suited to carrying out these tasks, and he has argued that in their current form, American parties have come close to “a nearly mythical version of Westminster-style democracy akin to many of the aspects championed by those in favor of the responsible party thesis.”²⁵⁰

246. See SCHUMPETER, *supra* note 93, at 250–68.

247. See generally E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT (1942); COMM. ON POLITICAL PARTIES OF THE AM. POLITICAL SCI. ASS’N, TOWARD A MORE RESPONSIBLE TWO-PARTY SYSTEM (1950).

248. COMM. ON POLITICAL PARTIES OF THE AM. POLITICAL SCI. ASS’N, *supra* note 247, at 1–2.

249. See generally AUSTIN RANNEY, CURING THE MISCHIEFS OF FACTION: PARTY REFORM IN AMERICA (1975). For an assessment fifty years later of the work of the Committee for a More Responsible Two-Party system, see CONFERENCE PROCEEDINGS — APSA RESPONSIBLE PARTIES PROJECT, 1950–2000, <http://www.apsanet.org/~pop/proceedings.htm>.

250. See ALDRICH, *supra* note 6, at 296.

Other normative accounts of parties have emphasized their role in facilitating democratic action in a pluralistic society. By competing for votes from different interest groups, aggregating interests within the party, and facilitating negotiation and compromise between those interests, parties serve as a pluralistic forum and mechanism for the articulation and vindication of collective goals. Along these lines, Professor Rosenblum defends party politics as encouraging the moral values of “inclusiveness, comprehensiveness, and disposition to compromise” that are fundamental for successful pluralistic democracies.²⁵¹ These values “are congruent with standard democratic virtues” such as “mutual respect, minimal concern for the interests and opinions of others, provisionality, and resolving disputes through argument.”²⁵² But party rivalry specifically requires partisans to “identif[y] with others in [a] system of regulated rivalry,”²⁵³ whereby no party “speak[s] for the whole” but partisans “think[] they should speak to everyone.”²⁵⁴ This system of party rivalry requires “commitment to the provisional nature of political authority, its periodic recreation . . . [that] is the distinguishing feature of representative democracy, and the moral distinctiveness of partisanship.”²⁵⁵

Extending these normative visions of contemporary parties (which are at least potentially consistent with empirical reality) to presidential administration, a different, less majoritarian justification emerges. Presidential power is not justified for its potential to bring agencies in line with median preferences. This justification founders on the shoals of partisan reality. Instead, presidential oversight facilitates responsible party governance by creating a means for the policy programs that were developed by the winning party to be implemented in practice. This fulfills one of the basic requirements of responsible party government—that parties be “willing *and able* to carry . . . out [policy commitments] when in office.”²⁵⁶ Presidential control also facilitates attribution of the choices made by agencies to an elected official. Cutting agencies loose from presidential influence undermines the ability of parties to affect policy by winning elections and the ability of voters to hold an elected official

251. ROSENBLUM, *supra* note 91, at 362–64. “Among political identities, only partisanship has this potential for inclusiveness, comprehensiveness, and disposition to compromise.” *Id.* at 362 (emphasis omitted). It is worth noting that Rosenblum is very interested in the felt identification with party, which is emphasized less in Cohen et al. and Aldrich. Hers is a “party-in-the-electorate” oriented theory, while Cohen et al. and Aldrich focus on elites.

252. *Id.* at 362.

253. *Id.* at 362.

254. *Id.* at 365.

255. *Id.* at 363.

256. NELSON W. POLSBY & AARON B. WILDAVSKY, *PRESIDENTIAL ELECTIONS: STRATEGIES OF AMERICAN ELECTORAL POLITICS* 208 (4th ed. 1976) (emphasis added).

accountable for agency actions. Only if “elections have consequences”²⁵⁷ can responsible parties emerge and partisans be given an incentive to cultivate Rosenblum’s pluralistic qualities of “inclusiveness, comprehensiveness, and disposition to compromise.”²⁵⁸

Understanding the virtue of the presidency in programmatic rather than representational terms may be the beginning of a new normative account of presidential oversight, but it is not the end. Presidential influence can facilitate a dynamic interplay between parties that have incentives to develop distinct programs, test them for voter appeal during elections, and implement them while in power. But Congress also has a stake in agency oversight, and the collision of contemporary political parties and the constitutional structure of separation of powers creates complications for responsible party government. The promise and pitfalls of the legislative-executive split are discussed in the next Part. In addition, administrative law embeds other social values, including neutral expertise, vigor, coherence, and legality that are no easy fit with party rivalry. In Part V, this Article will turn to the question of how to reconcile these values with the benefits brought about by responsible party government.

IV. RELATIONSHIPS WITH CONGRESS

Congress plays a substantial role in overseeing the Executive Branch of government in the United States.²⁵⁹ This power stems both from Congress’s position in the constitutional structure and from steps that Congress itself has taken to increase its internal capacity for executive oversight. The shared oversight dynamic between Congress and the President raises a host of questions that have occupied political scientists since the dawn of the field,²⁶⁰ including the comparative institutional incentives for the President

257. This phrase is frequently attributed to Dick Gephardt. See Leo Hindery, Jr., *Elections Have Consequences—And Carry Messages*, HUFFINGTON POST (Nov. 12, 2012, 9:30 AM), http://www.huffingtonpost.com/leo-hindery-jr/elections-have-consequenc_b_2116585.html.

258. ROSENBLUM, *supra* note 91, at 362. Jerry Mashaw makes a similar point by raising concerns that in a world where agency decisions are divorced from presidential preferences, elections would be reduced to “beauty contests.” See Mashaw, *supra* note 188, at 96.

259. See JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 20 (1990) (noting congressional oversight during early years of the Republic). See generally MASHAW, *supra* note 35; CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792–1974 (Arthur M. Schlesinger, Jr. & Roger Bruns eds. 1975). Aberbach goes so far as to characterize the U.S. Congress as “the world’s most powerful legislative body[,] with great influence over agency behavior.” ABERBACH, *supra*, at 22.

260. See, e.g., WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* (1885). For a more recent entry, see Alan E. Wiseman, *Delegation and Positive-Sum Bureaucracies*, 71 J. POLITICS 998 (2009).

and Congress to carry out oversight activities²⁶¹ and each institution's likely success in bringing agencies to heel.²⁶²

The rise of contemporary parties may influence Congress and the relationship between the President and Congress in many ways. The following discussion focuses on how contemporary parties affect the dynamic of shared oversight and will focus on the potential for conflict between the branches that arises from agency oversight. The programmatic, national, and professionalized nature of contemporary parties affects the ability of individual members of Congress to coordinate over shared goals and the distribution of power in the body. The growth of contemporary parties has likely helped shift the emphasis of oversight from member-constituent-driven interests toward promotion of party programmatic goals. Although some commentators have argued that this shift has exacerbated tendencies toward gridlock that are built into the U.S. constitutional system, there may be countervailing democratic benefits associated with this form of public scrutiny of agency action that should be acknowledged and considered.

A. *Shared Oversight*

Congress also has a variety of tools to influence administration. The foundations of Congress's influence over the administrative state are its lawmaking power, its budgetary power, its role in appointment, and its hearing and investigative power. Congress has built on this constitutional foundation through internal organization to enhance its capacity to use these powers effectively.

The legislative power is vested in the Congress, and as courts like to say, administrative agencies are "creatures of statute, bound to the confines of the statute that created them."²⁶³ Although Congress sometimes provides

261. See Moe, *supra* note 12 (noting increasing expectations as a source of incentive for the President).

262. See, e.g., John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 1 (1990) (investigating effect of Congress on bureaucracy); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy? Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119 (1996); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

263. U.S. Fidelity and Guar. Co. v. Lee Invs. LLC, 641 F.3d 1126, 1135 (9th Cir. 2011) (citing Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB, 502 F.2d 349, 353 n.* (D.C. Cir. 1974) ("An administrative agency . . . is a creature of the statute that brought it into existence.")).

wide grants of authority to agencies,²⁶⁴ the United States Code is full of detailed statutory schemes that limit the field of action for agencies.²⁶⁵ Statutes govern not only regulatory ends and means, but also administrative process and the structure of administrative agencies.²⁶⁶ Decisions concerning the organization of the executive, including “what departments to create, how to organize those departments into various authorities and agencies[,] and whether to create agencies outside of any department,” rest largely with Congress in the exercise of its lawmaking function.²⁶⁷ Congress has similarly expansive powers over the budget and frequently uses appropriation riders to directly influence agency policy choices.²⁶⁸

264. For a critique of broad delegation to agencies, see SCHOENBROD, *supra* note 181; Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295 (1987).

265. See, e.g., *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (requiring the agency to adhere to statutorily required deadlines for pollution reduction despite contrary policy considerations). Of course, complexity can also breed discretion. See, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 863–65 (1984) (justifying deference to the EPA Administrator in interpreting Clean Air Act in part because the statute is “technical and complex”).

266. See STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* (2008); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989). Statutory deadlines for rulemakings are another source of congressional control. See William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RES. & THEORY 495 (2013) (finding that nearly one-third of studied rules were specifically mandated by Congress, with the remainder being discretionary exercise of statutorily created authority). Reporting requirements are another congressional tool. See Jonathan G. Pray, Comment, *Congressional Reporting Requirements: Testing the Limits of the Oversight Power*, 76 U. COLO. L. REV. 297 (2005). See generally Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007) (arguing that the Supreme Court uses procedure to “negotiate” between congressional control (procedure) and presidential control (deference)); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 39 (citing Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, LAW & CONTEMP. PROBS., Autumn 1991, at 127, 175) (arguing that Congress throughout the 1980s responded to Reagan’s imposition of presidential authority by “burying the EPA in more bureaucracy”).

267. Jack M. Beerermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 107–08 (2006). Congress can use agency structure and decision-making processes to empower itself, entrench favored interests, insulate agencies from presidential influence, or even set up an agency for failure. See Moe & Wilson, *supra* note 266, at 6. See also CROLEY, *supra* note 266 (arguing that structure and process can protect broad general interests); Barkow, *supra* note 64; Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J. L. ECON. & ORG. 93 (1992); McCubbins, Noll & Weingast, *supra* note 266.

268. See CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 34354, *CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS* (2008), <http://fas.org/sgp/crs/misc/RL34354.pdf>; Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 767 (2010); Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1352–56 (1988); Hans J.G. Hassell & Samuel Kernell, *Veto Rhetoric and Legislative Riders* (2013) (unpublished manuscript), <http://pages.ucsd.edu/~skernell/resources/Hassell-and-Kernell,-Veto-Rhetoric-and-Legislative-Riders-%288-27-2013%29.pdf> (discussing veto threat).

The role of the Senate in appointments provides an additional point of leverage for Congress over agencies.²⁶⁹ Senators can use their power over these appointments to influence the candidates who are nominated. Especially during periods of divided government, the Senate confirmation process has the potential to increase the ideological distance between the President and Senate-confirmed political appointees. Although empirical confirmation of the effect of the Senate on administrative agency appointments is extremely difficult, efforts have been made to examine the influence of the Senate on judicial appointments.²⁷⁰ This literature has identified a statistical connection between political preferences in the Senate at the time of a judge's nomination and case outcomes for that judge.²⁷¹ The Senate confirmation process can also be used to prod the administration on unrelated policy matters.²⁷²

Finally, Congress's hearing and investigative powers are another source of influence. There is no congressional equivalent to the President's bully pulpit, but there are opportunities for Congress to focus public scrutiny on administrative agencies.²⁷³ Although "mass media attention does not come easily" for oversight activities, there are many high-profile examples in which committees have successfully used hearings to raise the political salience of an issue.²⁷⁴

269. Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations, 1885–1996*, 43 AM. J. POL. SCI. 1122, 1124 (1999).

270. See, e.g., Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001).

271. See Donald R. Songer & Martha Humphries Ginn, *Assessing the Impact of Presidential and Home State Influences on Judicial Decisionmaking in the United States Courts of Appeals*, 55 POL. RES. Q. 299 (2002). But see Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 196–97 (2009) (finding relatively modest predictive gains from using "common space scores" based in part on political preferences in the Senate over the party of the appointing president).

272. For example, in recent years, Democratic senators stalled President Obama's appointments to protest administration policy on offshore oil drilling and relationships with Cuba. Lewis, *supra* note 58, at 587–88 (Mary Landrieu on oil drilling; Robert Menendez on Cuba). Professor and former OIRA Administrator Cass Sunstein describes his experience during the nomination process as beginning with a "nightmarish process known as vetting" and culminating in a series of holds by Republican senators meant to extract concessions from the administration. CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 19–26 (2013).

273. In addition to reaching the public, hearings can be used to communicate congressional intentions to the agency or to communicate committee views to the rest of Congress. See Charles M. Cameron & B. Peter Rosendorff, *A Signaling Theory of Congressional Oversight*, 5 GAMES & ECON. BEHAV. 44 (1993). Empirical analysis suggests that these hearings have an effect. See Mary K. Olson, *Agency Rulemaking, Political Influences, Regulation, and Industry Compliance*, 15 J.L. ECON. & ORG. 573 (1999) (increased oversight led to heightened enforcement and greater compliance); Jeffery C. Talbert, Bryan D. Jones & Frank R. Baumgartner, *Nonlegislative Hearings and Policy Change in Congress*, 39 AM. J. POL. SCI. 383 (1995); Brian D. Feinstein, *Congressional Control of Administrative Agencies* (2014) (unpublished manuscript) (on file with the Alabama Law Review).

274. ABERBACH, *supra* note 259, at 119.

Congress also takes steps to build on these constitutional powers. Internal reorganizations have been repeatedly undertaken to increase Congress's power free from judicial scrutiny. Most important is the committee structure, which began at the time of the founding and has gone through successive waves of restructuring.²⁷⁵ The Legislative Reorganization Act of 1946, which was explicitly undertaken to enhance legislative oversight, was adopted the same year as the Administrative Procedure Act. Congress has also built out its internal bureaucracy through increased budgets for committee and member staff, and through the creation and funding of entities such as the Congressional Budget Office and the Government Accountability Office. The Congressional Review Act, adopted in the wake of *INS v. Chadha*, is another attempt (albeit less successful) at enhancing review over agency actions.

B. Party Discipline in Congress

The oversight tools discussed above are exercised by a diverse body, not a unitary actor.²⁷⁶ The paradigmatic legislative action is passage of a bill, along with the associated procedures of committee and floor votes. Oversight activity is inherently more decentralized. Only certain oversight activities, such as votes on appropriations or confirmation (in the Senate), require action on the floor. Other important oversight is carried out on the committee or subcommittee level, and individual members can pursue certain oversight activities by themselves. For this reason, the concept of congressional influence over agencies is hard to pin down. Agency responsiveness to congressional majorities, congressional leadership, committee leadership, or individual members might all be understood as “congressional” influence. Institutional arrangements, including the internal structure of Congress as well as the organization of political parties, can affect both the total amount of congressional influence (broadly understood) on administrative agencies and how that influence is distributed within the body.²⁷⁷

275. The committee structure enhances control through specialization, but also results in decentralization, which, given member career incentives, can end up reducing effectiveness. Lawrence C. Dodd, *Congress and the Quest for Power*, in CONGRESS RECONSIDERED, *supra* note 118, at 269, 277–83.

276. ABERBACH, *supra* note 259, at 23 (noting conflict between “individual versus collective interests” in Congress).

277. In general, power in Congress can be distributed along roughly three lines: according to the “institutional median,” according to “allocation politics” based on the strength of member preferences, and according to the “partisan median” of the majority party. See Doo-Rae Kim, *Political Control and Bureaucratic Autonomy Revisited: A Multi-Institutional Analysis of OSHA Enforcement*, 18 J. PUB. ADMIN. RES. & THEORY 33 (2008).

Irrespective of how power is distributed within Congress, the constitutional structure of shared oversight forces the President to jockey for position with various legislative actors in an ongoing struggle over the reins of the bureaucracy. At various points in U.S. history, Congress, its committees, and its members have decidedly had the upper hand vis-à-vis the presidency. For example, during the late nineteenth century, Congress was able to assert such strong control over the bureaucracy that Woodrow Wilson—in his pre-politician days as a scholar of American political institutions—lamented that “congressional government” led to a host of pathologies that could only be addressed through reforms leading to a more parliament-like system.²⁷⁸

In subsequent decades, generations of political scientists have followed Wilson in studying interactions between the President, Congress, and the bureaucracy.²⁷⁹ A particularly influential group of scholars writing in the 1970s and 1980s developed a set of empirical and normative observations concerning Congress, administrative agencies, and the President that challenged dominant understandings of how these institutions operated and interacted.²⁸⁰ This group of scholars in economics, political science, and law looked to the behavior of the institutions and actors around them. And just as Woodrow Wilson’s views were influenced by the particular circumstances of his day, this group was affected by the organization of political life during the decades when their ideas were formed.

Scholars during this period studied the federal government at a time when traditional political parties were in a severe state of decline and contemporary political parties were just beginning to take form. What they saw when they studied the institutions around them was constituent- (rather than party-) oriented members of Congress, powerful seniority- (rather than party-) based congressional committees, captured or aggrandizing bureaucrats, weak or absentee presidents, a disorganized public, and interest-group dominance.²⁸¹ Together, their findings painted a highly

278. See WILSON, *supra* note 260.

279. See, e.g., Ferejohn & Shipan, *supra* note 262; Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); Craig Volden, *A Formal Model of the Politics of Delegation in a Separation of Powers System*, 46 AM. J. POL. SCI. 111 (2002); William F. West & Joseph Cooper, *Legislative Influence v. Presidential Dominance: Competing Models of Bureaucratic Control*, 104 POL. SCI. Q. 581 (1989).

280. Particularly influential were rational choice accounts that modeled legislators and regulators as rational, self-promoting actors in political markets in which regulation is traded. See Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

281. See THEODORE J. LOWI, *THE END OF LIBERALISM* 55–93 (1969) (discussing interest group domination); ELECTORAL CONNECTION, *supra* note 95 (arguing that members of Congress hewed closely to the desires of their constituents); WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND*

evocative picture of an “iron triangle” of influence-trading between agencies, the industries they regulated, and the congressional committees that oversaw them.²⁸² This iron triangle was criticized for benefiting the powerful and well-organized at the expense of broad public interests such as consumers and workers.²⁸³

A new generation of scholars has revisited the claims that political parties play very little role in structuring legislative politics, especially in light of the rise of contemporary parties.²⁸⁴ Perhaps the two most influential accounts of parties in Congress in recent years are Cox and McCubbins’s “cartel” theory and Rohde’s conditional party government model.²⁸⁵ Under the cartel model, legislative parties are a mechanism for members of Congress to solve collective action problems through “negative agenda control.”²⁸⁶ Legislative offices with “special agenda-setting powers”—such as the Speaker and important committee chairmanships—are selected by the majority party, and the occupants exercise delegated authority on behalf

REPRESENTATIVE GOVERNMENT 53 (1971) (budget-maximizing model of government bureaucrats); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965) (on the overrepresentation of small, concentrated interests vis-à-vis diffuse interests); Kenneth A. Shepsle & Barry Weingast, *Legislative Politics and Budget Outcomes*, in *FEDERAL BUDGET POLICY IN THE 1980S* 343, 351 (Gregory B. Mills & John L. Palmer eds., 1984) (on committee power); Lance T. Leloup & Steven A. Shull, *Congress Versus the Executive: The “Two Presidencies” Reconsidered*, 59 *SOC. SCI. Q.* 704 (1979) (suggesting that the President is often hamstrung in carrying out a domestic policy agenda). The relative autonomy of agencies was a particular source of interest. *See generally* ROBERT A. KATZMANN, *REGULATORY BUREAUCRACY* (1980); James Q. Wilson, *The Rise of the Bureaucratic State*, 41 *PUB. INT.* 77 (1975).

282. This three-sided relationship is sometimes referred to in the political science literature as “subgovernment.” *See* Daniel McCool, *Subgovernments as Determinants for Political Viability*, 105 *POL. SCI. Q.* 269, 269 (1990); *see also* Andrew S. McFarland, *Interest Groups and Theories of Power in America*, 17 *BRIT. J. POL. SCI.* 129, 134 (1987) (providing a more general account of interest group politics that includes “plural elitism” as one of several possible manifestations). In general, this group of scholars rejected both benign pluralism and public-spirited social planners as accurate representations of Congress and the bureaucracy. *See generally* EDWARD C. BANFIELD, *POLITICAL INFLUENCE* (1961); DAVID BRAYBROOKE & CHARLES E. LINDBLOM, *A STRATEGY OF DECISION* (1963); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); ROBERT A. DAHL, *WHO GOVERNS?* (1961); NELSON W. POLSBY, *CONGRESS AND THE PRESIDENCY* (3d ed.1976); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* (2d ed.1971); AARON B. WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* (1964).

283. *See* Stewart, *supra* note 68.

284. *See, e.g.*, D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* 22–38 (1991) (arguing that delegation can forward the policy goals of the majority party in Congress, undercutting the claim that delegation implies “abdication” on the part of the legislature). Not every scholar writing in recent decades has come to the conclusion that parties are the main driving force of congressional organization. *See* KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991) (pursing an informational account of legislative organization in which structure forwards the preferences of the body as a whole, rather than a partisan coalition).

285. *See* LEGISLATIVE LEVIATHAN, *supra* note 94, at 2; SETTING THE AGENDA, *supra* note 94, at 38; DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 31 (1991).

286. SETTING THE AGENDA, *supra* note 94, at 101.

of the party.²⁸⁷ Defection from the party agenda is assured not by policing member voting, but by only allowing legislation that will generate conforming behavior to reach the floor.²⁸⁸

For Rohde's conditional party government model, party dominance only arises when there is sufficiently homogenous party membership together with an institutional context that places power in the hands of a leader who is responsive to the median-party member.²⁸⁹ Without sufficient agreement among members, party coalitions fracture, and the power for a stable majority coalition to exercise control is latent. Rohde's account helps explain periods of both more united, party-dominated Congresses and more decentralized, committee-dominated Congresses.²⁹⁰ Rohde also produces evidence that the contemporary period—starting with the transition of the South to the Republican Party and the House rules reforms in the 1970s—is one in which the conditions necessary for conditional party government have been met.²⁹¹ If this is the case, we can expect those congressional institutions that are subject to majority control—such as the House leadership and the committees—to be responsive to the median member of the controlling party.

If parties do play a role in structuring legislative politics more generally, the question remains whether and how parties affect oversight activities. Although some oversight activities require the whole Congress to act, much of the prosaic oversight work is carried out by committees and individual members. The mechanisms of negative agenda control hypothesized in Cox and McCubbins's cartel theory, for example, would not function as an effective tool for resisting defection concerning oversight. Unlike in the context of legislation, where committees serve as gatekeepers for “floor” activity, individual members can pursue at least some oversight activities on their own initiative. Although certain activities—such as votes on presidential nominees, appropriations riders, and legislation that affects an agency's operations—must pass through committee gates, other oversight is much more decentralized and is frequently undertaken at the subcommittee and individual levels.²⁹²

287. *Id.* at 24–25.

288. *Id.* (“[C]artel members expect those appointed to agenda-setting offices to *always* obey ‘the first commandment of party leadership’ – *Thou shalt not aid bills that will split thy party* – and to sometimes obey the second commandment – *Thou shalt aid bills that most in thy party like.*”).

289. ROHDE, *supra* note 285, at 169.

290. *Id.*

291. *Id.* For information on the congressional reforms of the 1970s, see Eric Schickler, Eric McGhee & John Sides, *Remaking the House and Senate: Personal Power, Ideology, and the 1970s Reforms*, 28 LEGIS. STUD. Q. 297 (2003).

292. See generally ABERBACH, *supra* note 259 (explaining common oversight activities, few of which involve floor votes).

Rhode's theory of conditional party government, where homogeneity among members is a causal factor, is more consistent with a stronger role for partisan considerations in oversight. Where co-partisans share a more-or-less homogenous set of preferences, even their decentralized oversight activities will conform to partisan expectations.²⁹³

The internal organization of Congress also likely affects the degree to which partisan considerations affect oversight activities, compared to more particularistic, constituent-driven concerns. In this respect, the reforms ushered in during the 94th Congress, which included greater authority by legislative leadership over the appointment of committee chairs, a shifting of expertise away from oversight committees, and the reduction of committee staff, may have been particularly important in harmonizing oversight activities with the broader party program.²⁹⁴

C. *Interbranch Sparring*

The recent emergence of a more obviously partisan dynamic in Washington, D.C., has increased attention on the role of political parties and their place in the constitutional order.²⁹⁵ Some have expressed worries that partisanship will exacerbate conflict built into the separation-of-powers constitutional structure and inhibit government effectiveness.²⁹⁶ For example, in 2001, Kagan argued that partisan motivations can be “superimposed on institutional differences” and exacerbate interbranch conflict during periods of divided government.²⁹⁷ Others have argued that

293. It bears noting that co-partisans share incentives to coordinate their behavior on even many non-ideologically charged issues where coordination enhances their standing vis-à-vis the opposition. See FRANCES E. LEE, *BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE* 133 (2009).

294. See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

295. See, e.g., Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159 (2014). Professor Bulman-Pozen has recently argued that polarization has allowed partisan differences to be transposed onto the federalist structure “in ways that articulate, stage, and amplify competition between the political parties” in generally beneficial ways. Bulman-Pozen, *supra* note 126, at 1080.

296. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 664–65 (1984).

297. Kagan, *supra* note 3, at 2344. For Professor Mark Tushnet, the contemporary period of divided government is marked by “subdued constitutional ambition” in which “the aspiration of achieving justice directly through law has been substantially chastened.” Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 33 (1999). Tushnet extends this argument in his subsequent book, *THE NEW CONSTITUTIONAL ORDER* (2003).

partisanship suppresses essential competition between the branches during periods of united government.²⁹⁸

A lively empirical debate, initiated by Professor Mayhew in 1991, seeks to determine whether either of these fears is grounded.²⁹⁹ Mayhew finds that the federal government functions similarly under united and divided regimes, with equivalent levels of oversight and legislative productivity.³⁰⁰ Subsequent research has challenged those findings with evidence that partisan composition does indeed affect legislative behavior, with greater production of statutes during periods of united government and more rigorous oversight during periods of divided government.³⁰¹ Recent history provides stark support for the latter view. During President Obama's first two years in office, when Democrats enjoyed substantial majorities in both legislative chambers, major, sweeping pieces of legislation, including the Affordable Care Act and the Dodd-Frank financial reforms, were adopted. After the Republican Party gained a majority in the House in 2010, statutory production fell to essentially nil, and interbranch hostility rose considerably.

Focusing on administrative law, Professor McGarity contrasts a “deliberative, lawyer-dominated domain of traditional administrative law” with “blood-sport confrontations over agency rulemaking.”³⁰² The former

298. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006); see also Douglas Kriner, *Can Enhanced Oversight Repair “The Broken Branch”?*, 89 B. U. L. REV. 765, 783 (2009) (focusing on lack of oversight of the Iraq War during the united Republican government). The inverse is sometimes argued. According to the “responsible government model,” which looks to parliamentary systems of government for inspiration, unified government, by harmonizing incentives between the majority party in Congress and the President, is thought to overcome the pathological tendencies of overly antagonistic branches.

299. See DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002* 178 (2d ed. 2005) (finding that periods of divided government are not less productive).

300. *Id.*

301. See John J. Coleman, *Unified Government, Divided Government, and Party Responsiveness*, 93 AM. POL. SCI. REV. 821, 832–33 (1999) (finding greater legislative productivity and responsiveness to public opinion during period of united government); Sean Q. Kelly, *Divided We Govern? A Reassessment*, 25 POLITY 475, 482–83 (1993) (reexamination of Mayhew's data finding significant differences between divided and united governments); Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 LEGIS. STUD. Q. 295, 314 (2008) (finding that investigations respond to both the partisan composition and the cohesiveness of the majority party). For an early account, see Seymour Scher, *Conditions for Legislative Control*, 25 J. POL. 526, 537–38 (1963) (noting that the 1960 election of John F. Kennedy substantially decreased incentives for the Democratic House to scrutinize agency action). See also Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737 (2011).

302. Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1680, 1711–12 (2012); see also Kagan, *supra* note 3, at 2346–49 (arguing that during periods of divided government, members of Congress face partisan incentives to focus oversight activities on regulatory matters that have been signaled to be high priorities for the President).

approach manifested during the period when political parties played a less dominant role in congressional oversight.³⁰³ As parties have grown in prominence, the “blood sport” has commenced.³⁰⁴ As should be clear from the characterization of the contemporary period, McGarity finds it substantially less to his taste than the bygone era of traditional administrative law. In a recent essay, Professor Cass Sunstein sounds similar notes, coining the word “partyism” to describe the current level of partisanship in the nation’s culture and comparing partyism with other “isms” like sexism and racism—essentially a bias that undermines deliberation and rational thought.³⁰⁵

The blood-sport and partyism metaphors focus on the potential vices of political parties for the relationship between presidential and congressional oversight of agencies, but they do not present a general normative framework for evaluating how Congress interacts with agencies. McGarity’s “deliberative, lawyer-dominated domain” is likely unattainable, given the reality of contemporary political parties and the incentives for congressional actors to challenge the actions of the sitting President. If that is the only normative model, then the best that can be done is to limit congressional influence to the absolute minimum. But an alternative vision that focuses on the virtues of parties is also possible. This alternative is related to the potential normative justification given in Part III.C for presidential administration that is grounded in the concept of responsible party government.

With respect to presidential oversight, responsible party government is facilitated by a relatively free rein given to presidents to control administrative agencies. It is this free rein that makes it possible for a political party, after gaining office in a fair election, to implement its program. The link between elections and outcomes is what allows responsible party government to exist.³⁰⁶

Congress–President relations can also be examined through a responsible party government lens. Under this model, party competition generates alternative regulatory programs that are tested for popular support during elections, and while the winner implements the program, the losing party takes up positions in Congress to criticize the President and revise its program to improve its electoral appeal. Members of Congress in the out-of-presidency party use the platform given to them by their legislative roles to act in a similar vein to the shadow cabinet familiar from

303. McGarity, *supra* note 302, at 1680.

304. *Id.*

305. Sunstein, *supra* note 28.

306. *Cf.* SCHATTSCHNEIDER, *supra* note 247, at 69.

parliamentary systems such as the United Kingdom. The role of the shadow cabinet is perhaps most vividly manifested in the tradition of “question time,” with its origins in the Westminster system, in which the Prime Minister and other government officials submit to periodic questioning by members of Parliament from the opposition party.³⁰⁷ The shadow cabinet lacks a substantive role in government, but it enhances the public accountability of the majority party through constant scrutiny and criticism.

Although the responsible party government model highlights the democratic *potential* in a system of party-motivated opposition to the President’s regulatory program, adoption of a new normative model does not settle the matter. Rather, it reframes the inquiry. The question becomes whether current arrangements deliver on the promise of responsible party government, and whether those benefits justify the costs that are generated along the way.

In making that calculation, perhaps the most important consideration is that, in the U.S. constitutional system, an out-of-presidency party still enjoys substantial power. In a parliamentary system, the majority party holds all of the reins of power—the opposition has a voice, but little else. Not so in the United States, where even a party in the minority in both legislative houses can still use super-majority rules and member prerogative to exert influence. If an out-of-White-House party gains a majority in either legislative body, its power increases substantially. If opposition parties consistently find it to their advantage to obstruct altogether the actions of the executive, rather than negotiate or criticize, it has the potential to severely undermine the effectiveness of the government.³⁰⁸

The zenith of this obstructionist risk would occur if a stable equilibrium of divided control came about in which one of the major parties adopted a program of protecting the status quo against reform. Such a status-quo-protecting party would wield substantial power, given the U.S. constitutional structure’s inherent bias toward inaction. And since merely blocking changes to the status quo would not require coordination with the other party, a simple majority (or even sub-majority) in either chamber could be translated into a veto wielded with little need for compromise.

307. For a history of the practice of parliamentary questions, which have been in place in their modern form in the U.K. since the early nineteenth century, see D. N. CHESTER & NONA BOWRING, *QUESTIONS IN PARLIAMENT* (1962).

308. Research on the U.S. Senate has found that there do appear to be partisan motivations on the part of out-of-White-House senators to oppose the President’s program. These partisan motivations exist even on issues of widespread policy agreement; the mere fact that the President has championed an issue induces opposite-party senators to take an oppositional stance. *See generally* LEE, *supra* note 293 (undertaking extensive evaluation of behavior in the U.S. Senate). This fact does not bode well for civil and productive oversight.

The models of legislative party discipline discussed in the previous section also bear on whether the partisan oversight dynamic between the President and Congress is better described as blood sport or loyal opposition. There are, generally speaking, three sets of preferences that members must balance. The first includes those of the median voter in their districts; responsiveness to these preferences is predicted by Mayhew's electoral connection model of legislative politics.³⁰⁹ The second includes those of party actors operating through the primary or caucus system.³¹⁰ The third is the preferences of the median co-partisan in Congress; this is predicted by Cox and McCubbins's cartel theory and Rohde's conditional party government theory.³¹¹

A responsible party government approach to congressional oversight seems most likely to arise if members are responsive to the party median in the legislature, as opposed to alternative sources of pressure. Responsiveness to constituent medians is likely to devolve into the kind of particularistic claims on the administrative state that drove earlier criticisms of congressional oversight.³¹² The aggregate collection of particularistic claims, likely closely related to regional concerns rather than programmatic agendas, do not add up to the comprehensive program that is consistent with responsible party government.³¹³

Responsiveness to discipline from external, non-legislative party actors, on the other hand, runs a greater risk of escalating into the blood sport and partyism that McGarity and Sunstein fear. Schlesinger describes centrifugal and centripetal pressures within political parties that, respectively, pull parties away from and toward the median voters in the national constituency.³¹⁴ Centrifugal force is generated by the desire of politicians to be elected to office and drives parties to adopt programs that are attractive to a broad swath of the electorate. Centripetal force is generated by the activist base of a party: the donors, volunteers, and policy networks that pull party programs toward their outlier preferences. Schlesinger believes that centripetal forces can be important, but that in the final analysis, politicians and their desire to remain in office will carry the

309. See PLACING PARTIES, *supra* note 95.

310. See *supra* Part I.C.

311. Legislators have their own policy preferences as well, a point stressed by ALDRICH, *supra* note 6. In Aldrich's model, these preferences tend to pull politicians away from median voters and toward the partisan median—for purposes of the analysis above, they can be treated as exerting a similar force as intense policy demanders.

312. See Kagan, *supra* note 3.

313. See JOSEPH P. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION (1964) (arguing that Congress pursues narrow interests and that Congress can hamper executive action that is more nationally oriented).

314. See SCHLESINGER, *supra* note 217, at 177–79.

day on most issues.³¹⁵ But Schlesinger's faith may be misplaced or outdated; if contemporary political parties have become so dominated by intense policy demanders that they systematically sacrifice the broad national interest in smooth governance to engage in obstructionism or "message politics,"³¹⁶ concerns about an era of blood-sport politics may be well founded.

If the conditions exist for politicians—and especially centrist voices within each party—to resist particularistic and centrifugal pressures through party structures, the risks of a blood sport are reduced. The question is whether contemporary political parties give politicians the tools they need to resist the two sets of pressures that inhibit responsible party government. There are good reasons to believe that particularistic pressures are less important than in the past; by many measures, politicians in both parties conform to their party programs, even at the expense of local benefits. At the same time, the centrifugal pressure from intense policy demanders has increased, and high-profile examples of party leaders losing their seats to primary challengers serve as a reminder that the balance of power within parties between politicians and intense policy demanders does not tilt definitively toward politicians.³¹⁷

Just as the structure of political parties affects the ability of the President to exercise managerial control over agencies and the justification for presidential control, it also affects relationships with Congress. A Congress that is run by party-organized and electorally oriented legislators can be expected to engage in relatively more productive critical sparring with the President over the policy course that is set in a given administration. When in the minority, the out-of-presidency party will nevertheless be able to give voice to criticisms of the President's program and articulate an alternative vision. When in the majority, the out-of-presidency party will use its power to increase the volume of its criticism, and, at least part of the time, to engage in productive dialogue and compromise to expand its electoral appeal. All of these behaviors are highly consistent with a responsible party government model. Then again, if Congress is run by politicians who are in thrall to or cowed by intense policy demanders—especially those intent on status-quo-protecting obstructionism or symbolic message politics divorced from policy outcomes—then congressional oversight is more likely to resemble a blood sport than productive policy disagreement.

315. *Id.*

316. Devins, *supra* note 301, at 758.

317. See generally Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *YALE L.J.* 804 (2014) (discussing mechanisms to enhance centralized party control and avoid outside pressures on politicians to tilt toward extreme views).

V. RESPONSIBLE PARTY ADMINISTRATION

For some time, commentators have recognized deep tensions at the heart of the administrative state.³¹⁸ Agencies are asked, on the one hand, to be democratically responsive, and on the other, to carry out their responsibilities with neutral expertise. They should maintain fidelity to the law but also administer fragmented statutory authority with vigor and coherence. Under the most optimistic versions of presidential leadership, White House oversight mitigates these tensions, but the reality of contemporary parties undermines that happy narrative.³¹⁹ Traditional administrative law provides an alternative approach, grounded in procedural and substantive norms that protect legality, public participation, and neutrality. But, while this approach has strong attraction, it has not adapted to new realities, including the centrality of contemporary parties in the administrative state.³²⁰

At the same time, although responsible party government may help define normative aspirations for contemporary political parties, it is incomplete (at best) as a model of administration. The oversight roles of the President and Congress create opportunities for parties to develop and implement programmatic agendas while in control of the White House and criticize the other party when out of power. These oversight roles help facilitate responsible party government in a constitutional system in which power is fractured between the legislative and executive branches. But agencies are typically thought to be more than instruments to implement party programs—other values central to the legitimacy of the administrative state are incompletely captured by, and sometimes contradict with, responsiveness to party programs.

This Part proposes and applies a normative account of administrative law that seeks to integrate party government with traditional administrative values. This responsible party administration framework evaluates legal arrangements based on how well they facilitate responsible party government while protecting important administrative values, such as expertise. This approach can be applied to a host of questions both within and outside of the area of administrative law, from institutional design to legal doctrine. Two particularly important sets of issues that affect responsible party administration are doctrines concerning judicial deference

318. Herbert Kaufman, *Emerging Conflicts in the Doctrines of Public Administration*, 50 AM. POL. SCI. REV. 1057, 1057 (1956).

319. *See supra* Part III.

320. *See generally* Farber & O'Connell, *supra* note 5.

and the practice of regulatory review, both of which are treated in some detail below.

A. *Administrative Values and Party Rivalry*

Six decades ago, Professor Herbert Kaufman described “three core values” that structure the organization and operation of administrative institutions in the United States. He designated those values as “representativeness, neutral competence, and executive leadership.”³²¹ The final value may be best understood as *coherence* and *vigor*—principles that might be brought about by strong executive leadership.³²² In a recent survey, Professor Vermeule offers “constitutionality,” “democratic credentials,” and “epistemic capacity” as the dominant normative frameworks for understanding the administrative state.³²³ The principles stressed by Kaufman and Vermeule can be thought of as clusters of normative goals that capture a broad spectrum of aspirations and commitments that have motivated analysis, justification, and reform of agencies and oversight institutions for many years.³²⁴ For purposes of analysis, the following discussion draws four categories of administrative values: *coherence and vigor*, promoted by executive leadership; *representativeness*, promoted by some form of democratic accountability; *expertise*, promoted by professionalism and substantive rigor; and *legality*, which requires constitutional and statutory pedigree for administrative action.

321. Kaufman, *supra* note 318.

322. *Id.*

323. Adrian Vermeule, *The Administrative State: Law, Democracy, and Knowledge*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION (Mark Tushnet, Sanford Levinson, & Mark A. Graber, eds. 2015). The overlap of the two scholars, writing several decades apart, is instructive: the complex interplay of democratic accountability and expertise is an enduring concern for the administrative state. The divergence is instructive as well—Kaufman does not carve out a distinct category of constitutionality as an administrative value, which may reflect a period of relative consensus concerning the desirability of strong national administrative institutions. Vermeule, writing during a period of presidential ascendancy, does not stress coherence and vigor, which were dominant considerations in earlier years.

324. Other normative perspectives, such as welfarism and civic republicanism, can and have been used to evaluate institutional design in the administrative state. *See, e.g.*, MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006) (welfarism); Mark B. Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) (civic republicanism). These normative frameworks could be, to some extent, captured by the Kaufman/Vermeule values—for example, representativeness could be thought to be related to certain interpretations of welfarism where actual preferences serve as the basis for welfare determinations. Or, alternatively these institutional values might be thought to be justified themselves if they facilitate welfare maximizing outcomes. In any case, the four values are used here to represent classic administrative law considerations, not the whole scope of potential normative theories that could be brought to bear on the administrative state. *Cf.* Vermeule, *supra* note 323.

Administrative values sometimes coexist comfortably and sometimes conflict. Presidential power and neutral competence were a comfortable fit during the Progressive Era, when measures to dismantle the spoils system (such as civil service employment protections) simultaneously shored up professionalism within the bureaucracy and sapped authority from traditional party organizations that competed for power with the President. At the same time, it is hard to deny the potential for conflict between administrative law values.³²⁵ Democratic responsiveness and neutral expertise, for example, are not obvious bedfellows.³²⁶

Contemporary political parties have ambiguous effects on these administrative law values and the tension between them. First, contemporary parties both enhance and interfere with the values of coherence and vigor promoted by executive leadership. Partisans of more programmatic parties may use their positions in Congress to thwart the President's agenda, sap resources away from administrative agencies, embarrass the White House, starve agencies of necessary resources, deny statutory authorization, hold up the federal budget, impede essential debt financing, or even undermine foreign policy initiatives. Collectively, these efforts drain the ability of presidents to exercise leadership and reduce presidential and agency aspirations. At the same time, as discussed in Part II, contemporary parties boost presidential power over agencies—placing hiring decisions more firmly under White House control, providing a bank of loyal and competent personnel, and generating innovative programmatic platforms for presidential administrations to pursue while in power.

The second administrative value, representativeness, is also placed under multiple countervailing pressures by contemporary parties. Programmatic parties may foster representativeness by clarifying lines of accountability and establishing the regulatory policy stakes of elections. At the same time, the structure of contemporary parties may pull presidential and congressional preferences away from the center and toward the desires

325. For its most ardent defenders, presidential administration manages to overcome all of the potential tensions between administrative values simultaneously. Under this account, discussed in detail in Part III, presidents bring a coherent vision and vitality to agencies, in part because they must be responsive to a broad national constituency. At the same time, presidents have incentives to promote neutral competence in administration to deliver on their promises to the electorate. To this union of Kaufman's three values (which is at the heart of Justice Kagan's defense of presidential administration, *cf.* Kagan, *supra* note 3) we might add unitary executive constitutional interpretations that attempt to reconcile the vast contemporary federal bureaucracy with the constitutional structure.

326. During his time, Kaufman noted an "emerging conflict" between executive leadership and neutral competence because presidents, "in whom administrative responsibility and power were to be lodged, were also partisan politicians." Kaufman, *supra* note 318, at 1067. Kaufman predicted that, "[p]olitical scientists of the . . . future, looking back, may well conclude that it is not easy to bridge the gap between . . . seeking to encourage the growth of a professional bureaucracy and . . . turmoil over how to control it." *Id.* at 1073.

of party activists and intense policy demanders. To the extent that the extreme donor and volunteer bases of the two political parties dominate more moderate voices, political control over agencies will tend to pull administrative decision making away from majority preferences.

Contemporary parties have similarly ambiguous effects on neutral competence. As discussed in Part II, contemporary parties comprise some entities—such as advocacy organizations and think tanks—that are deeply embedded within the issue networks associated with particular administrative agencies (or groups of agencies). These issue-network entities cultivate policy expertise in the arcane and highly technical matters that are at the center of many administrative proceedings. This technical expertise helps ensure that political appointees are not mere “amateurs” with no choice but to defer to civil service experts purportedly under their control.³²⁷ Instead, they come into office with the ability to competently manage and evaluate the performance of the departments they supervise. But this competence is not neutral; it is applied to forward programmatic goals associated with the competing parties. Technocratic competence provides political appointees with the *means* to effectively oversee agencies, but party programs provide the *ends* to which that oversight authority is used. Furthermore, as political appointees penetrate deeper into administrative agencies, they displace and undermine the career incentives of permanent personnel. To the extent that political points can be scored by “bureaucrat bashing” and reducing the professional staff lines at agencies, parties will also have incentives that are antagonistic to agency expertise.³²⁸

Finally, from the perspective of legality, contemporary parties play an even more problematic role. There is no obvious sense in which party government enhances the legal pedigree of agency action. At the same time, the strong interest group affiliations and ideological commitments associated with contemporary parties may undermine the felt obligation on the part of political appointees to neutrally carry out laws that they disagree with or that harm favored party constituencies. Similarly, for those with constitutional concerns about the administrative state, the explicit incorporation of regulatory policy into party programs may increase the perception that agency leaders claim “the power to decide . . . which policy goals [they] wish[] to pursue,” a power critics believe can only be legitimately exercised by Congress.³²⁹

327. See Kaufman, *supra* note 318, at 1062.

328. See generally R. Sam Garrett, James A. Thurber, A. Lee Fritschler & David H. Rosenbloom, *Assessing the Impact of Bureaucracy Bashing by Electoral Campaigns*, 66 PUB. ADMIN. REV. 228 (2006).

329. *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J. concurring) (claiming that *Chevron* deference violates constitutional separation of powers principles).

Contemporary parties can also increase tensions between administrative law values. As described in Part III, the structure of contemporary political parties undermines at least a straightforward, median voter–based model of presidential accountability, placing a wedge between the values of vigor and coherence (often thought to be promoted by presidential influence), on the one hand, and representativeness on the other. Similarly, among proponents of neutral competence, many argue that agencies are the repositories of expertise and impartiality and that presidential control, whatever its virtues in terms of vigor, will tend to undermine the role of professional judgment in agency decision making.³³⁰

There are two general strategies for reconciling the tensions between contemporary parties and administrative values. The first is to enhance party *responsibility* through institutions and doctrine that promote the development of normatively attractive forms of party rivalry.³³¹ The alternative of *irresponsible* party government is a world of powerful constituencies within parties that have overbearing influence on presidential and congressional oversight, leading to agency policy that tilts toward ideological extremes and congressional oversight that swings between neglect and gridlock. In this world, party control presents few virtues, and administrative values are systematically sacrificed for very little useful end.

But even were responsible party government to be fully realized, there would still be conflict with administrative values. When a statute is at odds with a President’s party program, carrying out the party agenda will conflict with the administrative value of legality. The inevitable overriding of career bureaucrats by political appointees conflicts with the value of expertise. Oscillating agency policies during periods of electoral transition undermine coherence and vigorous implementation of the law. Differing party programs—essential to responsible party government—ensures that agency policies will stand at some distance from the median voter, conflicting with the value of representativeness.

The second strategy attempts to mitigate these conflicts through responsible party *administration* that defines a legitimate scope for party government in a context where administrative values are given their

330. See, e.g., Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209 (2012); RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE’S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC* 12245 (2010); see also Barkow, *supra* note 64, at 19 (“The classic explanation for agency independence is the need for expert decision making.”); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 612–13 (2010) (discussing expertise-based justifications for limiting presidential influence).

331. For a normative account of parties that makes explicit attractive and unattractive forms of party rivalry, see ROSENBLUM, *supra* note 91.

appropriate due. For example, the adjudication/rulemaking dichotomy illustrated in *Londoner* and *Bi-Metallic*—foundational cases in American administrative law—create a separation between spheres that remains useful in a responsible party administration framework.³³² Granting procedural rights to protect the particularistic, backward-looking context of adjudication from partisan influence does little to harm responsible party government and provides substantial benefit to core administrative values associated with expertise and legality. The general, efficiency-oriented and future directed context of rulemaking is a better candidate for partisan influence—more closely related to the goals of responsible party government and less damaging to administrative values.

Responsible party administration encompasses both strategies: first improving party responsibility; and second vindicating administrative values while providing legitimate scope for party government. This formulation is admittedly vague—the concept of party responsibility is open to interpretation, as is the best balance of administrative values and party government. A few additional words can partially clarify the picture. This is a pragmatic project, in the sense that it does not attempt an account of administrative law for all times, or under optimal conditions, but instead seeks to respond to the contemporary political environment in a way that draws out potential benefits while limiting downside risks. It is also, therefore, temporary and contingent on current circumstances. Although instability in administrative law is not desirable, some degree of unpredictability necessarily accompanies a legal system that evolves alongside the dynamic political ecosystem which it inhabits.³³³

The project is also pluralistic, in the sense that it acknowledges multiple, competing values that must be balanced and accommodated, rather than reduced to a single overarching dimension. Perhaps it is possible to fully reconcile a best possible account of parties with a best

332. See Richard J. Pierce, Jr., *Separation of Powers and the Limits of Independence*, 30 WM. & MARY L. REV. 365, 366–67 (1989) (noting that *Londoner* and *Bi-Metallic* have long established the distinction between actions that affect individuals or small groups from those that affect a “large number of people”).

333. Although there is doubtless some value in developing normative models that are intentionally abstract, failure by actual decision makers to recognize the distance between contemporary politics and an ideal democratic system would turn administrative law into Pliny’s ostrich. PLINY, NATURAL HISTORY bk. 10, ch.1 (Harris Rackham trans., 1938) (observing, in is C.E. 77 discussion of “the Ostrich,” that “their stupidity is ... remarkable; for although the rest of their body is so large, they imagine, when they have thrust their head and neck into a bush, that the whole of the body is concealed”). The consequences of legal decisions are affected by political realities, and if consequences matter, the normative aspirations used to evaluate the law must take account of them as well. Cf. Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991); Thomas Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J. L. & PUB. POL’Y 219 (1997).

possible account of the administrative state, but this project takes the more modest goal of highlighting conflicts and clarifying tradeoffs between competing priorities. If none of the values embedded in responsible party administration are lexically prior to the others, reforms that make comparatively substantial improvements along some dimensions with few countervailing negative effects should be adopted.³³⁴ Outside these contexts, where genuine conflict between competing values arises, one's favored resolution will frequently depend on intuitions concerning the relative importance of one or the other values, a set of debates that will not be joined here.

Finally, this project explicitly recognizes the reality of partisan influence over agencies, and allows for the *desirability* of parties and the potential for beneficial interaction between parties and the administrative state.³³⁵ The role of politics or contested values in informing administrative decision making has long been recognized.³³⁶ The concept of responsible party administration specifically recognizes the value of political parties for a functioning democratic society, and examines administrative law through that lens. Under the responsible party administrative framework, *ceteris paribus*, administrative law reforms that facilitate responsible parties are desirable. Legal arrangements that impose some cost to traditional administrative law values may even be acceptable, as long as the benefits to responsible parties are sufficiently great.

A host of institutional design and doctrinal questions are implicated by the framework of responsible party administration. Because it favors responsible parties, it implicates electoral law, campaign finance, civic engagement, and the law and conventions that structure party and legislative organization.³³⁷ Agency structure helps determine the degree of exposure of agency decision making to different types of partisan influence and can also have implications for party responsibility as lines of authority and accountability are clarified or obscured through institutional design. Structural decisions implicated by responsible party administration include the number of political appointees within agencies and the number of

334. Cf. Michael A. Livermore, *The Meaning of Green Growth*, 3 MICH. J. ENVTL. & ADMIN. L. 33, 59–63 (2013).

335. Compare with Mark Seidenfeld, *The Role of Politics in the Deliberative State*, 81 GEO. WASH. L. REV. 1397 (2013) (attempting to examine administrative procedures that allow for *political* value to inform administrative decisions, but not examining how administrative law interacts with the role of parties specifically).

336. See, e.g., Stewart, *supra* note 68.

337. See generally SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (Nathaniel Persily ed., 2015) (providing various policy recommendations that roughly track responsible party government norms). See also, Ian Vandewalker and Daniel I. Weiner, *Stronger Parties, Stronger Democracy: Rethinking Reform* (Brennan Center Working Paper, 2015).

positions subject to Senate approval; the norms and conventions that govern the Senate confirmation process; the incorporation of “equalizing” factors into agency structure;³³⁸ the distribution of litigating and budgeting authority in the executive; the internal organization of congressional oversight and the structure of so-called independent agencies;³³⁹ and the allocation of responsibility to state or federal agencies.³⁴⁰

Rather than attempting to survey this entire landscape, the following sections focus on two illustrative questions related to agency rulemaking. The first examines judicial review of agency reasoning-giving alongside (putative) deference to agency legal interpretations. The second examines centralized executive oversight. These two issues are important in their own right and are indicative of the tensions involved in responsible party administration, but they far from exhaust the possible applications of the framework.

B. Judicial Review

As discussed in Part I.B, in the 1970s the D.C. Circuit expanded judicial review of agency rulemaking.³⁴¹ These requirements included both procedural elements, such as limits on ex-parte communications for informal rulemaking, as well as “hard look” review of the substance of agency policy decisions under the arbitrary and capricious standard.³⁴² Commentators have characterized the goal of courts at this time as attempting to “reinvent[] the administrative process as a perfected political process” that facilitated pluralistic bargaining between interest groups and was removed from the corrupting influence and distorting power imbalances of the electoral system.³⁴³

In 1978, the Supreme Court took aim at the D.C. Circuit’s innovations in *Vermont Yankee*. Then-Justice William Rehnquist, joined by a unanimous court, strongly chastised the D.C. Circuit for having “unjustifiably intruded into the administrative process” and imposed

338. See Barkow, *supra* note 64.

339. See, e.g., Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation (Feb. 12, 2008) (unpublished manuscript) (examining effects of partisanship requirements on preferences of agency officials), <http://dho.stanford.edu/research/partisan.pdf>.

340. See generally Bulman-Pozen, *supra* note 126.

341. See *supra* Part I.B; see also Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389 (2000) (discussing cultural changes that precipitated administrative law reforms at that time).

342. See Stewart, *supra* note 68, at 1805–07.

343. Bressman, *supra* note 67, at 475.

requirements that “border[] on the Kafkaesque.”³⁴⁴ The Court held that the Administrative Procedure Act “establishe[s] the maximum procedural requirements which Congress was willing to have the courts impose” and implied that anything more allowed a court to invalidate a rule when it was “unhappy with the results reached” by the agency.³⁴⁵

Vermont Yankee garnered a mixed reception in the D.C. Circuit.³⁴⁶ On the one hand, that court embraced the *Vermont Yankee* message in cases like *Sierra Club v. Costle* that refused to find that White House influence invalidated a rulemaking process, stating that courts were not authorized to “convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.”³⁴⁷ On the other hand, some procedural limitations on informal rulemaking—such as the *Portland Cement* doctrine that agencies must disclose data and studies in their notices of proposed rulemakings—have survived, and the Supreme Court has not seen fit to issue a follow-up decision extending *Vermont Yankee* to void these requirements.³⁴⁸

Even had *Vermont Yankee* fully stopped the courts from imposing additional procedural requirements on agencies, there remains a role for probing substantive review of agency decisions for legality and reasoning. In *State Farm*, the Court reiterated the legitimacy of hard look review, leading to semi-procedural requirements on agencies to compile voluminous administrative records and respond to substantive comments received through the notice-and-comment process. Some commentators have argued that these reason-giving requirements have, essentially, replicated the most onerous procedural demands under a different name.³⁴⁹

344. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 556–58 (1978).

345. *Id.* at 524.

346. The D.C. Circuit’s treatment of ex-parte contacts requirements in informal rulemaking is instructive. In two cases issued in 1977, the D.C. Circuit issued conflicting opinions on ex-parte contact limitations in informal rulemaking. *See Action for Children’s Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977) (declining to limit ex parte contacts); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (limiting ex parte contacts). After *Vermont Yankee*, the foray into policing ex-parte contacts was essentially abandoned. *See, e.g., United Steelworkers v. Marshall*, 647 F.2d 1189, 1214 (D.C. Cir. 1980) (recognizing that post-*Vermont Yankee*, if there is no statutory basis for a procedural protection, “that is virtually the end of the inquiry,” except where the lack of a procedure “violated the due process rights of the petitioners” or there are “extremely compelling circumstances” that allow courts to “impose nonconstitutional extra-statutory procedures on agencies” (internal quotation marks omitted)).

347. *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981). For a critical take on *Sierra Club v. Costle*, see Heinzerling, *supra* note 80 at 178–79 (saying that the decision turns rulemaking into decision a “charade,” “undermines the fundamental rationale for administrative agencies,” and “perverts the place of expertise in administrative law”).

348. *See Beermann & Lawson, supra* note 83.

349. *See Pierce, supra* note 83.

Given the penetrating role of hard look review, it is worth considering how this institutional arrangement fits with responsible party administration, and in particular whether, and how, it promotes either party responsibility or administrative values.

Judicial review under the arbitrary and capricious standard increases the cost and length of the rulemaking process, but also helps ensure that agencies examine the most important consequences of their regulatory actions and consider public input.³⁵⁰ In the language of administrative values, arbitrary and capricious review could be thought to privilege expertise, and perhaps representativeness, over the vigor and coherence brought by executive leadership.³⁵¹ Party government is also affected by arbitrary and capricious review. Slowing down the rulemaking process makes it more difficult for incoming administrations to carry out their party's policy programs through regulation—it can take months, and even years, for a new administration to see its policy preferences carried through the rulemaking process, and resource constraints limit the number of policy domains that a new administration can influence. This lag reduces the policy consequences of elections, undermining party government.³⁵²

If a different balance between administrative values and party responsiveness is desirable, arbitrary and capricious review is a potential candidate: more lenient review would enhance the ability of parties to implement their programs; more probing review would facilitate at least some of the administrative values (although at a cost to others). But such reform must be scrutinized carefully. One proposal, debated in a recent spate of law review articles, would allow agencies to provide “political reasons” for their decisions.³⁵³ Those who favor political reasons argue that

350. Compare Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) with Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251 (2009) (defending judicial review against claims that it imposes *undo status quo* bias on agencies).

351. Professor Mark Seidenfeld argues that the seeming tension between hard look review and political influence is frequently overstated. See Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (2012). Specifically, Seidenfeld argues that agency expertise is used to clarify the tradeoffs between regulatory alternatives and policy motivations inform the choice between those alternatives. *Id.* Hard look review, under this account, facilitates expertise without necessarily undermining accountability to political leaders.

352. Even under Seidenfeld's account of hard look review, *id.*, arbitrary and capricious review, by slowing down the regulatory process and injecting courts into regulatory decision making, reduces the net influence of parties on administrative action.

353. See Enrique Armijo, *Politics, Rulemaking, and Judicial Review: A Response to Professor Watts*, 62 ADMIN. L. REV. 573 (2010); Stephen M. Johnson, *Disclosing the President's Role in Rulemaking: A Critique of the Reform Proposals*, 60 CATH. U. L. REV. 1003 (2011); Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419 (2009); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811 (2012); Glen Staszewski, *Political Reasons, Deliberative Democracy, and*

such a regime will better comport with the practical reality of political control and would increase accountability to voters by clarifying lines of authority between the President and administrative decisions.

But while political reasons would likely increase party responsiveness, the responsible party administration framework may provide good reasons to be skeptical. An expanded role for political reasons may shift the balance of power toward *irresponsible* parties by making it more difficult for centrist, technocratic-oriented constituencies within parties to resist demands from the extremes.³⁵⁴ If agencies are required to give public-regarding reasons for their actions, it will be costlier and riskier to pursue policies that have little connection to some plausible public interest.³⁵⁵ If political reasons lower the costs of pursuing policies that are disconnected from broad national interests, they may shift power within parties in favor of intense policy demanders at the expense of those actors within parties whose incentives better align with broad national interests. The net results may be an increase in party government that comes at the expense of administrative values (such as legality) as well as increased risk of party irresponsibility.

Although the Court has given no indication that it intends to adopt political reasons, it has also been hesitant to heighten the standard of review to counteract risks specifically generated by party control over agencies. Perhaps most obvious was the failure of the Court to adopt a doctrine disfavoring inconsistent agency action in its 2009 decision *Fox v. FCC*.³⁵⁶ A robust doctrine on consistency helps mitigate one of the inherent risks associated with partisan oversight over agencies—policy oscillation. When agencies change their positions to reflect an incoming administration, the result may be new policies that no better reflect the interests of voters but that impose costs by upsetting settled expectations and creating the risk of future, unproductive policy uncertainty.³⁵⁷

Administrative Law, 97 IOWA L. REV. 849 (2012); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009).

354. Cf. Short, *supra* note 353, at 1869 (noting the potential for political reasons to shift authority within the agency to shift between expert-oriented staff and politically minded appointees). See generally Elizabeth Magill & Adrian Vermeule, *Allocating Power within Agencies*, 120 YALE L.J. 1032 (2011).

355. Under Seidenfeld's characterization, *supra* note 351, requiring agencies to accompany their regulatory choices with neutral explanations of the tradeoffs involved similarly makes it difficult for agencies to be responsive to more extreme constituencies without the controlling party.

356. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

357. Concerns about policy oscillation have been a driving motivator in the creation of independent agencies. Barkow, *supra* note 64, at 24. Policy stability is seen as particularly important in the context of financial regulation. See Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 348 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); Devins and Lewis, *supra* note 62, at 465–66 (discussing the Fed); David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The*

Nevertheless, the Court held in *FCC v. Fox* that, although “[a]n agency may not . . . depart from a prior policy *sub silentio* [,] . . . it need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one.”³⁵⁸ Despite the outcome in *FCC v. Fox*, the Court’s hesitation to develop an explicit doctrine on consistency garnered only a bare majority, and perhaps not even that, given a concurrence by swing-vote Justice Kennedy that agreed with portions of Justice Breyer’s dissent.³⁵⁹ It is possible that future decisions will increase the cost of inconsistency, changing the calculus for political parties toward focusing on establishing, rather than changing, agency positions. Arguably, such an arrangement would leave adequate room for party government while better protecting administrative values.

The *Chevron* doctrine also has complicated consequences for responsible party administration. In *Chevron*, the Court reaches in many different normative directions to justify judicial deference to agency interpretations, which at least arguably conflicts with the value of legality.³⁶⁰ In practice, the consequences of deference for administrative values is often contingent on party control of the executive, a factor that the Court does not (explicitly) consider. For example, when the President’s preferences are aligned with the mission of an agency, then the value of expertise is likely to be well served by deference because the policy choices embodied in regulation will be more likely to reflect the views of the expert bureaucrats at an agency. On the other hand, when the policy program of the party in control is out of sync with an agency’s mission, then deference will ill-serve neutral competence; the outcome selected by political appointees may well differ from the judgment of the career civil servants.³⁶¹ Exactly the opposite consequences arise for representativeness.

Relative Durability of Insulated Agencies, 34 BRIT. J. POL. SCI. 377, 400 (2004) (noting that “[i]n insulated agencies the impact of changing administrations is muted so that policies have less variance”); Vermeule, *supra* note 63.

358. *Fox*, 556 U.S. at 515.

359. *Id.* at 535–39.

360. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). The Court notes its relative incompetence in making judgments in technically complex areas of law. *See id.* at 865 (“Judges are not experts in the field . . .”). The Court also raises a representativeness argument, noting that agencies, through the President, are “directly accountable to the people.” *Id.* at 864–66. The Court also grounds deference in the value of executive leadership, finding that it is appropriate for an agency to “rely upon the incumbent administration’s views of wise policy to inform its judgments.” *Id.* In addition, an alternative “official theory” has developed that *Chevron* reflects adherence to the intent of Congress. *See* Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1555–57 (2015) (reviewing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014)) (reciting, without endorsing, the delegation theory of *Chevron*).

361. *See* Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (arguing that the Court, in *Massachusetts*, was concerned that political considerations overrode agency expertise).

When the party in control of the White House is in conflict with an agency's mission, that tension may reduce the risk of a non-representative outcome, and deference serves its goal.³⁶² When the party in control of the White House is aligned with an agency's mission, there is greater risk of an outcome that tracks partisan, rather than majoritarian, preferences.

Although *Chevron* deference has ambiguous consequences for the administrative values at its putative foundations, from the perspective of party government, deference clearly increases the ability of parties to implement their programs after electoral success.³⁶³ The Court, however, may have recently signaled an appetite for scaling back deference in exactly the context where it most facilitates responsible party government. In *King v. Burwell*, upholding health care subsidies in the Affordable Care Act, Chief Justice Roberts, writing for a six Justice majority, included the following language:

When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."³⁶⁴

The Court then went on to examine the relevant statutory issue, finding that it was a "question of deep economic and political significance" and therefore, "had Congress wished to assign that question to an agency, it surely would have done so expressly."³⁶⁵

The Court's move is problematic for reasons offered by Justice Breyer in his dissent in *Brown & Williamson*, the case that Justice Roberts relies on in *Burwell*.³⁶⁶ It is exactly the high-profile questions where party

362. This effect could be analogized to so-called panel effects on appellate courts, a phenomenon in which panels that draw judges with different partisan affiliations appear to reach systematically different conclusions than panels that draw judges with affiliations of only one party. *See generally* VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIAL COURT* (2006).

363. *Cf.* Sunstein, *supra* note 28.

364. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (citations omitted).

365. *Id.* at 2489.

366. *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190–91 (2000) ("[T]he very importance of the decision taken here, as well as its attendant publicity, means that the public is likely to be aware of it and to hold those officials politically accountable. Presidents, just like Members of Congress, are elected by the public. Indeed, the President and Vice President are the *only* public

influence over agency decision making is most likely to be responsible—voters are paying attention, and if they are displeased, they will know who to blame. The opposing party has plenty of incentives to highlight difference on those high-profile issues and make its case that the program of the party in power, as developed in the regulatory action at issue, is undesirable. When the electoral consequences of agency decisions are substantial, party responsibility is at its zenith, and the legitimate scope of party influence over agency decisions making is greatest. The Court in *Burwell* turns this logic on its head, seemingly indicating that the decisions of less public concern, in which voter inattention is greatest, and the risks of party pandering to intense policy demanders is greatest, are those that deserve the greatest deference.

It bears mentioning generally in the context of judicial review that courts themselves are not outside the influence of contemporary parties. Although the role of partisan commitments in affecting judicial decision making can be overstated, moral or ideological commitments do play a role and, even assuming good faith behavior on the part of judges, presidents, and senators, when making appointment and confirmation decisions, can “take into account judicial characteristics that may potentially bear on the moral and political questions that appropriately arise in legal disputes.”³⁶⁷ Given the role of the political branches in judicial appointments, it should come as no surprise that the rise of contemporary parties has, in fact, been associated with an increasingly contentious judicial confirmation process.³⁶⁸ Judicial review of agency action falls into a larger set of issues implicated by the potential for contemporary parties to negatively affect the functioning of the courts. In particular, the incorporation of regulatory programs into national politics increase the payoff of using the nomination and confirmation process to screen judicial candidates based on signals related to policy attitudes, with potentially negative effects for the independence and functioning of the courts. Proposals to “scrap[]” the presumption of judicial reviewability of agency action or scale back the role of courts in examining agency structure may help reduce the threat of an increasingly polarized judiciary.³⁶⁹ Such proposals, of course,

officials whom the entire Nation elects. I do not believe that an administrative agency decision of this magnitude—one that is important, conspicuous, and controversial—can escape the kind of public scrutiny that is essential in any democracy.”).

367. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1897, 1943 (2009).

368. See O’Connell, *supra* note 26.

369. Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1335 (2014) (“Because it is unjustified in principle and harmful in practice, the presumption of reviewability should be scrapped.”); Huq, *supra* note 17 (proposing a less extensive role for the courts in supervising agency structure). See also Cass R. Sunstein & Thomas J. Miles, *Depoliticizing*

necessarily risk sacrificing the administrative values that are promoted by judicial review.³⁷⁰ Ultimately, in a political environment that is dominated by contemporary political parties, the degree of and risk for polarization of the judiciary are among the factors that must be weighed against competing considerations when evaluating the normative desirability of the current regime of a relatively strong role for courts in overseeing administrative agencies.

C. Executive Review

Before adopting any major substantive regulation, agencies are required by executive orders—in place since the Reagan administration—to submit their proposal for review by the Office of Information and Regulatory Affairs in the White House. This review process is often held out as the archetypical example of presidential administration.³⁷¹ Presidents from both political parties have endorsed regulatory review, and it is now an enduring feature of the American regulatory state. Nevertheless, regulatory review remains deeply controversial, and proposals to reduce its influence or eliminate the practice altogether are periodically floated.³⁷² Given its prominent role, and the consistent criticism that it has faced, it is useful to examine how well the institution of regulatory review conforms to the normative goals of responsible party administration by facilitating either party responsibility or administrative values.

Perhaps surprisingly, given its important policy role, OIRA is staffed almost entirely by civil service bureaucrats, rather than political appointees. These bureaucrats are typically trained in economics, statistics, and public policy; many of them do not turn over with a change in party control.³⁷³ Only the Administrator and two special assistants are political appointees.³⁷⁴ As a consequence of this arrangement, it is common for the work of political appointees at agencies to be evaluated by career

Administrative Law, 58 DUKE L.J. 2193 (2009) (examining partisan voting in administrative law decisions and proposing potential remedies, including mixed party panels).

370. See Bagley, *supra* note 369, at 1330 (presumption of reviewability “could foster adherence to law, improve agency deliberation, and increase the accuracy of agency decisions”). Purely from the perspective of responsible party government, partisanship on the courts has few benefits. Although it may increase the number of decisions subject to party influence, the lag between electoral victory and policy outcomes can be enormous. The beneficial feedback loop between elections and policy anticipated by responsible party government is effectively short-circuited by life tenure.

371. See, e.g., Kagan, *supra* note 3, at 2277–78.

372. See Steinzor, *supra* note 330.

373. See William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 PRESIDENTIAL STUD. Q. 76, 84 (2005).

374. *Id.*

bureaucrats at OIRA.³⁷⁵ Even for the political appointees, there is a well-established convention for appointees to be drawn from a pool of technocratic experts who do not have strong ties to particular interest groups.³⁷⁶

But although, at first glance, OIRA review might seem inconsistent with party control, a prominent role for career bureaucrats in regulatory oversight may, perhaps paradoxically, be well suited to conforming agency regulatory output to party programs. Contemporary party programs are policy slates that represent compromise between various constituencies. Securing and deploying the resources needed to gain and exercise power depends on developing programs that gather support from a sufficiently broad group of constituencies.³⁷⁷ Although the constituencies within parties work cooperatively to gain advantage against the competing party, they also work competitively to maximize their own advantage vis-à-vis each other in securing the benefits of party control. Especially when the program is being applied in specific instances during the course of a presidential administration, mediating conflict between disparate constituencies is essential.

Single-issue agencies may be poorly suited to navigate this intraparty, inter-constituency terrain. While in power, the collective good of the party coalition is served through the production of some optimal set of regulatory decisions, subject to legal and political constraints. In a complex policy environment, rarely will a regulatory choice simply provide a benefit to one constituency without any offsetting cost to another or reduction in electoral potential (which harms all party constituencies). Single-issue agencies may lack the perspective necessary to properly balance these competing concerns, and may be subject to overbearing influence by particular interest groups. In effect, there are risks that individual agencies may be “captured” by specific constituencies in ways that are detrimental to the aggregate good of the party in power.³⁷⁸

375. Livermore, *supra* note 132, at 622–23. This arrangement inverts the standard structure of political-appointee supervision of career bureaucrats. The model of OIRA review can be contrasted with a hypothetical review process run through some other office, such as the Domestic Policy Council, that was staffed primarily with political appointees rather than careerists. Indeed, at the state level, regulatory review is sometimes overseen by much more overtly political institutions. *See id.* at 685 n.364 (discussing Executive Order of Andrew Cuomo, transferring regulatory review power to overtly political office). *Cf.* West, *supra* note 373, at 86–89 (arguing that OIRA’s career staff subvert whatever policy preferences they have to respond to the needs of the political principals in power).

376. Livermore & Revesz, *supra* note 34, at 1373.

377. *See supra* Part III.B.

378. On agency capture, see generally PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2014).

OIRA review may help reduce this capture risk.³⁷⁹ As a generalist review institution, without strong ties to any particular constituency, there is less potential for overbearing influence by any single interest group. Because OIRA review touches on a wide variety of issue areas and is carried out by career bureaucrats, incentives to invest in influence are weak and highly diffuse. OIRA review also plays a strong coordinating role, soliciting views across the federal government on the regulatory proposals of each agency. By initiating interagency comment and acting as a clearinghouse for disparate views, OIRA review enhances the probability that the potential downsides of regulatory proposals will be aired and vetted. In essence, OIRA review helps identify those issues where conflicts between party constituencies are likely to arise and helps facilitate deliberation over how to settle those conflicts. In this way, OIRA review helps limit the risk of *ir*responsible party government by reducing the risk of intense policy demanders exploiting single-issue agencies and thereby moving the party away from majority preferences.

At the same time that OIRA may help facilitate responsible party government, its role in promoting administrative values is less clear. OIRA's location within the White House and ability to balance competing intraparty demands may allow it to insert technocratic criteria into political oversight.³⁸⁰ But OIRA has also been criticized for lacking substance expertise, and, as a practical matter, the breadth of the issues that OIRA staff must deal with, and the tight deadlines in which much of the work is accomplished,³⁸¹ may preclude building deep substantive expertise in particular issue areas. Although OIRA may be thought to have had a certain kind of expertise, in regulation more generally, agency officials have comparative strengths in issue-specific expertise. OIRA's coordinating function may help bring some measure of coherence to an administration's regulatory agenda, but OIRA review has also been criticized for contributing to regulatory "ossification" and reducing the vigor and responsiveness of agencies.³⁸² This problem is especially troubling because OIRA review is focused on agency action, while the failure to act is not

379. The logic in this and the following two paragraphs tracks Livermore & Revesz, *supra* note 34, at 1361–73.

380. Livermore & Revesz, *supra* note 34.

381. Alex Bolton, Rachel Augustine Potter & Sharece Thrower, Presidential Oversight and Regulatory Delay: How Politics and Organizational Capacity Influence OIRA Rule Review (unpublished manuscript) <http://www.lsa.umich.edu/UMICH/polisci/Home/Events/Thrower,%20Presidential%20Oversight%20and%20Regulatory%20Delay.pdf> (examining effect of staffing shortfalls on the pace of executive review).

382. See McGarity, *supra* note 350.

subject to similar scrutiny.³⁸³ From the perspective of representativeness, OIRA plays a more ambiguous role. Review may reduce the risk of agency capture, but OIRA itself is not subject to public participation and transparency requirements of the Administrative Procedure Act, and critics have argued that participation in the OIRA review process by outsiders tends to skew in favor of regulated industry.³⁸⁴

An area where OIRA has come under particular criticism for undermining administrative values is the issue of delay, and in particular delay that appears to be related to the electoral calendar. In addition to the typical group of critics who are skeptical of regulatory review in general, the Administrative Conference of the United States recently made several recommendations to OIRA to reduce undue delays in regulatory review.³⁸⁵ Some have argued that during the Obama administration, controversial rules were put on hold in the months leading up to the 2012 presidential election.³⁸⁶ Especially for agencies subject to court orders or statutory deadlines, these electorally motivated delays undermine the value of legality in the administrative process.

OIRA has also been criticized for inserting extra-statutory considerations into agency rulemaking, in particular through the requirement that agencies conduct cost-benefit analysis of their major rulemakings.³⁸⁷ There is a lively debate on this question. Some commentators have argued for a broad background norm that allows agencies to conduct some kind of weighing of costs and benefits, absent a clear statutory directive to the contrary.³⁸⁸ Others have strenuously objected, arguing, in effect, for the opposite default—absent a clear directive *to* consider costs, agencies should be prohibited from doing so.³⁸⁹ In cases such as *EME Homer* and *Entergy v. Riverkeeper* (both interpreting environmental provisions that are silent on cost considerations) the Court

383. Livermore & Revesz, *supra* note 34. This bias against agency action may generate a partisan bias in favor of Republican interests, which generally favor less stringent regulation.

384. RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, WHITE PAPER 1111, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT (2011) (documenting skewed participation in OIRA review process, with representatives from regulated industry participating at higher rates).

385. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ADMINISTRATIVE CONFERENCE STATEMENT NO. 18, IMPROVING THE TIMELINESS OF OIRA REGULATORY REVIEW (Dec. 6, 2013).

386. *See id.* at 4 (“Senior agency employees provided a variety of perspectives as to why they believe that OIRA review times increased in 2012–13, including . . . concerns by some in the Executive Office of the President (EOP) about the issuance of potentially costly or otherwise controversial rules during an election year . . .”).

387. *See, e.g.*, Heinzerling, *supra* note 181.

388. *See, e.g.*, Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651 (2001).

389. *See, e.g.*, BETTER MARKETS, SETTING THE RECORD STRAIGHT ON COST-BENEFIT ANALYSIS AND FINANCIAL REFORM AT THE SEC 28–32 (2012).

appears to lean toward the former interpretation, preserving agency discretion to consider costs when statutes are unclear.³⁹⁰ As a practical matter, even when statutorily prohibited from considering costs—such as when the EPA sets the national ambient air quality standards—it appears that agencies nonetheless weigh the downsides of regulation.³⁹¹ Still, to the extent that the anti-cost-consideration camp has the better legal argument, OIRA’s role in encouraging agencies to engage in cost-benefit analysis could run counter to their statutory authority.

Against this arguable tradeoff against the administrative value of legality are, potentially, important benefits for responsible party government that may be brought about by the systematic use of cost-benefit analysis. Most generally, the comprehensive nature of the technique accords well with a role for OIRA in helping avoid *ir*responsible party government. Agencies, operating under specific statutory directives and oriented toward particular policy areas may be subject to myopia, giving undue attention to particular classes of interests while ignoring or underemphasizing others. Cost-benefit analysis can help illuminate a broader range of regulatory effects that matter for a diverse set of party constituencies.

The methodology of cost-benefit analysis is also, itself, a site of partisan contestation. When OIRA review began, the methodology of regulatory cost-benefit analysis was in a stage of relative infancy. There were basic techniques for estimating regulatory effects and assigning rough dollar values, but standardized methods that could guide agencies or OIRA in carrying out or evaluating these analyses did not exist.³⁹² Over time, the methodology of regulatory cost-benefit analysis was constructed, essentially from whole cloth, in ways that promote some interests at the expense of others.³⁹³

390. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014) (upholding EPA rule on interstate air pollution in which the agency considered costs when setting emissions allowances for states); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009) (deferring to agency’s interpretation of Clean Water Act regulations to allow for a cost-based variance procedure). *See also* *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (requiring agency to consider costs when adopting hazardous air pollution standards for power plants).

391. *See* Michael A. Livermore & Richard L. Revesz, *Rethinking Health Based Environmental Standards*, 89 N.Y.U. L. REV. 1184, 1231–33 (2014).

392. The first guidelines issued by the White House on conducting regulatory impact analysis were highly perfunctory, and there was some time before significant centralized guidance was provided. Livermore, *supra* note 132, at 640–46.

393. *See id.* (noting that the EPA’s preferred methodology often carried the day). As carried out, cost-benefit analysis relies heavily on welfare economics for its intellectual underpinning, but that is a choice itself, and there are alternatives, such as happiness analysis. *See generally* JOHN BRONSTEEN, CHRISTOPHER BUCCAFUSCO & JONATHAN S. MASUR, *HAPPINESS AND THE LAW* (2014) (proposing happiness analysis as an alternative to cost-benefit analysis).

Initially, support for cost-benefit analysis split along partisan lines, with Democrats and affiliated interest groups strongly opposing Reagan's move to elevate the technique.³⁹⁴ Over time, bipartisan support for the technique grew, and partisan debates began to focus on methodological questions, including: the discount rate for future costs and benefits; the monetary value of reducing statistically small mortality risks; whether lives or life expectancy is the correct metric for mortality risk reduction; the default dose-response relationships to use for different classes of environmental pollutants; the effect of mandatory energy efficiency requirements on consumer welfare; the value of overseas climate change damages; the types of models to be used for estimating employment effects of regulation; and the relationships between corporate disclosure and systematic risk in the financial sector.

Positions on these questions can be, and to some extent have been, incorporated into party programs. Researchers Art Fraas and Richard Morgenstern examined fifteen years of statutorily required annual reports prepared by OIRA on the costs and benefits of federal rulemakings.³⁹⁵ Fraas and Morgenstern examine and compare the analytic priorities in Democratic and Republican administrations, finding important cross-administration differences. For example, there were differences in the "relative emphasis on difficult-to-measure" variables, with the Obama administration focused on regulatory benefits, such as the "value of ecological services and the value of dignity and equity," while during the Bush administration, there was greater "discussion of the uncounted costs of regulation, including those faced by small businesses."³⁹⁶ Similar differences are found in the treatment of discounting,³⁹⁷ and in unemployment.³⁹⁸ Other indications that cost-benefit analysis methodology has found its way into party programs include 2012 Republican presidential

394. See generally RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008). See, e.g., Philip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES, Nov. 6, 1981, at 28 (quoting Democratic Congressman Henry A. Waxman, among others, in opposition to the technique).

395. See Art Fraas & Richard Morgenstern, *Identifying the Analytical Implications of Alternative Regulatory Philosophies*, 5 J. BENEFIT COST ANALYSIS 137, 139 (2014).

396. *Id.* at 141.

397. *Id.* at 142 (Obama administration emphasizing future benefits).

398. *Id.* ("[T]he Bush administration tends to emphasize the trade-offs between regulations and more broadly defined economic performance" while the Obama administration focuses on "those analyses that find negligible impacts or even a positive relationship between regulation and employment.").

candidate Mitt Romney's endorsement of jobs impact analysis and the partisan character of recent debates on the social cost of carbon.³⁹⁹

Although the parties differ on certain methodological questions in cost-benefit analysis, it is important to note the degree of overlap and similarity.⁴⁰⁰ There are three general constraints that pull parties toward a fairly similar interpretation of cost-benefit analysis. The first is the need to balance the demands of relatively extreme elements within the party against the desire to appeal to a sufficiently broad swath of the electorate. Although very few voters have preferences over cost-benefit analysis methodologies, party constituencies care about the consequences that analytic choices have for regulatory outcomes.⁴⁰¹ Extreme positions on methodological questions will be difficult to maintain in the face of the general need to balance the demands of different groups alongside mass appeal.⁴⁰²

Second, cost-benefit analysis also provides technocratic legitimation to OIRA oversight, which could be eroded by unusual or extreme methodological choices. Despite the novelty of its application to regulation, at the time of the Reagan order, cost-benefit analysis already had a substantial pedigree in other settings.⁴⁰³ Defenders of Reagan's innovation could draw on this pedigree when seeking to legitimate regulatory review.⁴⁰⁴ Were the practice of cost-benefit analysis to depart too radically from the norms of the economic profession on which it was ostensibly

399. See Michael A. Livermore & Richard L. Revesz, *Interest Groups and Environmental Policy: Inconsistent Positions and Missed Opportunities*, 45 ENVTL. L. 1, 9 (quoting Mitt Romney campaign documents); see also Zack Colman, *GOP Senators Slam 'Significant Change' to Carbon Costs* THE HILL (June 19, 2013, 9:06 PM), <http://thehill.com/policy/energy-environment/306645-gop-senators-slam-significant-change-to-social-cost-of-carbon>.

400. Fraas & Morgenstern, *supra* note 395, at 169 ("The cross-administration differences we identify appear to reflect relatively modest shifting across political parties on issues where reasonable people may disagree.").

401. For example, a higher social cost of carbon will favor more stringent greenhouse gas regulation.

402. See *supra* Part III.B.

403. See Jonathan B. Wiener, *The Diffusion of Regulatory Oversight*, in THE GLOBALIZATION OF COST-BENEFIT ANALYSIS IN ENVIRONMENTAL POLICY 123, 134 (Michael A. Livermore & Richard L. Revesz, eds., 2013) (discussing roots of cost-benefit analyses in the French civil engineering tradition that spanned back nearly a century); see Edward P. Fuchs & James E. Anderson, *The Institutionalization of Cost-Benefit Analysis*, 10 PUB. PRODUCTIVITY REV. 25, 25 (1987) (discussing use of cost-benefit analysis in Robert McNamara's Department of Defense in the 1960s).

404. See Shabecoff, *supra* note 394 (stating that defenders of cost-benefit analysis at the time of the Reagan order noted that the technique has been used "for many years [by] the Army Corps of Engineers . . . to justify building big dams and other costly projects"); Joseph Cooper & William F. West, *Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules*, 50 J. POL. 864, 872 (1988) (arguing that cost-benefit analysis could "legitimate presidential power" by helping to "dispel" concerns about presidential arbitrariness); DeMuth & Ginsburg, *supra* note 182, at 1082 (arguing that the cost-benefit "standard and the OMB review procedure" are "complementary" to each other).

based, the technocratic legitimation for presidential review would lose its force.

There are also more purely bureaucratic reasons that invest cost-benefit analysis methodologies with inertia. Professor Sunstein refers to settled methodological practices (and the documents that embody them) as “a kind of common law for cost-benefit analysis” that is only changed after “an extended process, which . . . involve[s] many officials and sometimes a public comment period, and which is likely to bear fruit only if and when a consensus emerges.”⁴⁰⁵ In addition, OIRA is not invested with final authority to disapprove agency rules—when conflicts between an agency and OIRA cannot be resolved, they are “elevated” to senior political officials in the White House, and if serious enough, the President.⁴⁰⁶ Established cost-benefit analysis methodologies help minimize that outcome by setting the standard norms that can be applied to multiple rulemakings.⁴⁰⁷

Finally, the cost-benefit standard empowers agencies to have substantive influence on the shape of regulatory review.⁴⁰⁸ Over the past three decades, it has largely fallen on agencies to develop the methodology of cost-benefit analysis, based on their comparative advantage in technical expertise and resources.⁴⁰⁹ This agency influence occurs over the course of many years, and especially when arising from career bureaucrats, is a consistent pressure across administrations from both parties.

Taken together, these considerations constrain the range of debate over cost-benefit analysis methodology, and likely result in OIRA review exerting a moderating influence on agency decision making. Of course, if a President decides to depart from norms of economic efficiency in a particular regulatory decision, the qualms of an OIRA desk officer are unlikely to be a major roadblock.⁴¹⁰ But other factors being equal, the structure of OIRA review likely empowers more moderate political actors within an administration at the expense of the wings of both parties.

Regulatory review has become perhaps the central force shaping how party administration is achieved in practice by virtue of its role in balancing technocratic considerations and politics, agency independence and White House authority, and statutory directives and social considerations. OIRA’s

405. CASS R. SUNSTEIN, *VALUING LIFE: HUMANIZING THE REGULATORY STATE* 63 (2014).

406. See Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1856–58 (2013) (describing the process that occurs when controversies between agencies and OIRA cannot be resolved at the staff level).

407. Livermore, *supra* note 132.

408. *Id.*

409. *Id.*

410. Stuart Shapiro, *Unequal Partners: Cost-Benefit Analysis and Executive Review of Regulations*, 35 ENVTL. L. REP. 10433, 10438–39 (2005).

critics believe, in essence, that the current equilibrium is all wrong, arguing alternatively that technocrats have run wild, or that politics has infected regulatory decision making; that too much power rests in the White House, or that agencies should be reined in; that too much weight is placed on costs and benefits, or that there is a myopic focus on narrow statutory goals. Behind these criticisms are, in essence, competing normative visions of the meaning of responsible party administration that rest on differing views concerning the contribution of party competition to democratic politics, the current level of responsibility in party government, and the importance of one or the other administrative values. Given the basic tensions built into the concept of responsible party administration, these debates are unlikely to be resolved in the foreseeable future; at least so long as the administrative values that are deeply engrained in our institutional culture survive, and contemporary political parties take something like their current form.

CONCLUSION

Contemporary parties are now fully established on the political landscape. When presidents come into office, they do so at the head of a political party, having outlived intraparty challengers and led a successful electoral contest against the opposing party. In a very short period of time, they are called on to transition from no-holds-barred partisan campaigning to the highly constrained task of governing.⁴¹¹ They must fill several thousand appointed positions, balancing demands from campaign staff, donors, and interest groups. They confront an unruly group of co-partisans in Congress as well as a hostile opposition party. All of these features of the contemporary political ecosystem can have profound consequences for administration, political supervision of administrative agencies, and administrative law. Along with reorganizations within the Executive Branch and changes in judicial doctrine concerning the exercise of presidential power over agencies, the revival of political parties in their contemporary form fundamentally shape presidential administration. The normative and practical consequences of presidential oversight cannot be understood absent an accounting of contemporary parties.

This Article explores the consequences of contemporary political parties for the efficacy of presidential supervision of the regulatory state; the normative justification for presidential power over agencies; and the

411. Mario Cuomo is credited with the observation that “[y]ou campaign in poetry[:]; [y]ou govern in prose.” OXFORD DICTIONARY OF QUOTATIONS 247 (Elizabeth Knowles ed., 7th ed. 2009) (first appearing in *The New Republic* (Apr. 8, 1985)).

dynamic of shared oversight between the President and Congress. The weakening of traditional party organizations and the rise of contemporary parties that are comparatively professionalized, nationally oriented, and programmatic likely enhance the ability of the White House to subject agencies to presidential control. At the same time, the tendency of contemporary party programs to drift toward the extreme preferences of intense policy demanders at their base undermines—or at least complicates—traditional justifications for presidential control. Rather than relying on the President’s presumed fidelity to median-voter preferences, proponents of presidential administration may be better served by relying on the attractive characteristics of responsible party government as their normative touchstone. Similarly, whether interactions with Congress devolve into mere blood sport or can instead lead to democracy-enhancing dialogue depends on whether congressional parties are able to maintain the moderation necessary to hew to a responsible party government model.

This Article also examines the consequences of contemporary political parties for administrative law values and proposes the concept of responsible party administration to evaluate how well judicial and executive institutions promote normatively desirable party control while preserving important administrative law values. Because the influence of contemporary parties over presidential oversight is pervasive, the concept of responsible party administration can be applied to a host of administrative law questions, from judicial doctrine to agency design. This Article explores two salient and important areas: doctrines concerning judicial deference to agency decisions, and the institution of OIRA review. On the deference front, the Court appears to strike an odd posture—hesitant to exert influence over areas where a stronger judicial role might promote responsible party administration (e.g., to avoid oscillating policies), while growing more assertive in areas where the judiciary may bring little benefit (e.g., on question of major social importance). With respect to OIRA, this Article argues that the institution of regulatory review plays a major role in determining whether responsible party administration is carried out in practice, and discusses some of the benefits and costs associated with the current system of review.

For better or worse, contemporary political parties now structure American political life. But just as they are unlikely to evaporate from the political scene, they are unlikely to stay static as social and cultural forces press on the parties—in their mutual interlocking conflict—to adapt. As they evolve, parties will continue to demand a response from administrative law scholars and from courts. Balancing the potential benefits that contemporary parties may bring for democratic accountability against their costs to values such as expertise, neutrality, accountability, and efficacy

will likely continue to be one of the defining challenges for administrative law in the early twenty-first century.